Supreme Court, U.S.
FILED
SEP 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-502

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

QUINCY CABLE TV, INC., *et al.*,
Respondents.

JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The Federal Communications Commission in 1965 and 1966 adopted regulations that, *inter alia*, require cable systems to retransmit the signals of local broadcast stations that request carriage on the system. In 1968, after this Court upheld FCC jurisdiction to adopt such rules, the Eighth Circuit held that the rules were not invalid under the First Amendment. In 1985, in reviewing an FCC denial of an *ad hoc* waiver of the must-carry rules and an agency decision declining to institute rulemaking proceedings to consider whether the rules should be repealed, the District of Columbia Circuit (per Wright, J.), in the decision below, held that the must-carry rules were invalid as an abridgement of the First Amendment rights of cable television operators because the rules "coerced speech," thereby impinging on the "editorial discretion" of cable operators, and because the agency had failed to sustain its heavy burden of justifying the need for that deprivation of First Amendment rights.

The questions presented are:

1. For First Amendment purposes, are cable television systems to be treated as passive conduits for the "speech" of others, insofar as the systems are engaged in retransmitting the signals of television broadcast stations, or is that retransmission activity itself a form of "speech" within the meaning of the First Amendment?

2. Did the court below misapply the test for assessing "incidental" burdens on speech articulated in *United States* v. *O'Brien*, and thus exceed the proper scope of judicial review of administrative agency action, by concluding that the must-carry rules were unconstitutional because other, less speech-restrictive regulations might suffice to achieve the agency's purposes and by imposing a heavy burden of justification for the need for such rules?

3. After determining that the constitutionality of agency rules is dependent on a factual analysis of events and trends

following the agency's initial adoption of the rules, should the reviewing court remand the case so that agency, in the first instance, will develop that factual analysis?

LIST OF PARTIES

The parties in the consolidated cases decided by the Court of Appeals were Quincy Cable TV, Inc. ("Quincy"), petitioner in No. 83-1283, and Turner Broadcasting System, Inc. ("Turner"), petitioner in No. 83-2050. The Federal Communications Commission ("FCC") and the United States were respondents in both cases. The intervenors in No. 83-1283[1] and in No. 83-2050[2] are listed in the margin.

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[1]KHQ, Incorporated; Spokane Television, Inc.; King Broadcasting Company; Association of Independent Television Stations, Inc.; National Association of Broadcasters; and Town of Quincy, Washington.

[2]Metromedia, Inc.; Multimedia, Inc.; Community Antenna Television Association, Inc.; Black Entertainment Television; National Religious Broadcasters; The Seven Hills Television Company; Association of Independent Television Stations, Inc.; Corporation for Public Broadcasting; National Association of Broadcasters; Spanish International Communications Corporation; Bahia de San Francisco Television Company; Cosmos Broadcasting Corp.; Cox Communications, Inc.; Forward Communications Corp.; Illiana Telecasting Corp.; National Association of Public Television Stations; Columbus Broadcasting Company, Inc.; King Broadcasting Company; National Cable Television Association, Inc.; Association of Maximum Service Telecasters, Inc.; McGraw-Hill Broadcasting Company, Inc.; John H. Phipps Broadcasting Stations, Inc.; Summit Radio Corp.; Guaranty Broadcasting Corp; Wilson Communications, Inc.; Ralph C. Wilson Industries, Inc.; National Broadcasting Company, Inc.; Station Representatives Association; Taft Television and Radio Company, Inc.; and Maranatha Broadcasting Company, Inc.

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JOINT PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The parties joining in this petition,[1] all of whom were intervenors in the Court of Appeals, consist of various representatives of the television broadcast industry, including all of the major trade associations representing television broadcast licensees and several licensee corporations.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit, not yet reported, is reprinted in Appendix A at pp. 2a-60a. An earlier opinion by the Court of Appeals (per curiam)

[1]National Association of Broadcasters, Association of Maximum Service Telecasters, Inc., Association of Independent Television Stations, Inc., KHQ, Inc., Mararatha Broadcasting Company, Inc., Metromedia, Inc., National Broadcasting Co., Inc., National Religious Broadcasters, Spanish International Communications Corp., Bahia de San Francisco Television Co., The Seven Hills Television Co., Spokane Television, Inc., and Station Representatives Association, Inc.

remanding the *Quincy* case to the FCC, reported in 730 F.2d at 1549, is reprinted in Appendix B, pp. 63a-68a. The FCC's *Memorandum Opinion and Order* denying Turner's petition for rulemaking, reported at P&F 55 Rad. Reg. 2d 1365 (1984), is reproduced in Appendix C, pp. 69a-74a. The six opinions of the FCC and its staff in the *Quincy* matter are reprinted at pp. 75a-132a in Appendix D. Three of those opinions are reported at 89 FCC 2d 1128, 93 FCC 2d 2112, and 98 FCC 2d 1287.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on July 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

AGENCY REGULATIONS INVOLVED

The FCC rules held unconstitutional by the court below are codified at 47 C.F.R. §§ 76.57-.61 (1984), and are reproduced in Appendix E, pp. 133a-136a.

STATEMENT OF THE CASE

Typically cable television systems perform several distinct functions or services. So far as the record shows here, all systems retransmit the signals of television broadcast stations. These signals may be originated by nearby local broadcast stations, and in some instances cable may improve for subscribers the picture quality they would otherwise obtain from one or more of the local stations.[2] The signals may also be originated by "distant" stations which the cable system obtains through the use of (1) a tall tower not usually available to private home owners, (2) terrestrial microwave radio relay facilities, or (3) a

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[2]For consistently good reception, particularly in color and for UHF stations, an outdoor antenna, rather than set-top VHF "rabbit ears" and a small UHF "loop", is often essential. However, cable eliminates the need for an outdoor antenna, and for substantial numbers of viewers (such as apartment dwellers and those living in subdivisions that restrict outdoor antennas for aesthetic reasons) cable is the only practical alternative to "rabbit ears" and the UHF "loop."

communications satellite towards which the cable system orients a saucer-shaped satellite receiving "dish." Most systems also distribute some non-broadcast signals originated by various entities specifically for redistribution solely or primarily through cable systems. A few systems also originate some programs of their own.

When it initially adopted the must-carry rules, the FCC articulated several distinct bases and purposes: (1) the rules insure that cable subscribers will have ready access to local stations licensed to serve those viewers; (2) the rules insure that no local station will be placed at a competitive disadvantage vis-a-vis distant stations and such local stations as the cable system voluntarily carries;[3] (3) together with other rules, the must-carry rules offset the unfair competitive advantage that cable systems enjoy as a result of not having to bargain for program rights under the copyright laws and not having to obtain rebroadcast consent from distant stations pursuant to Section 325 of the Communications Act; and (4) in the absence of must-carry rules, cable systems potentially could block or impede the local broadcaster's access to enough homes to pose a serious threat to the economic viability and even to the very survival of some local stations. *First Report and Order in Docket No. 14895, et al.*, 38 FCC 683, 700-01, 705-06, 713-15 (1965) ("*First Report*"); *Second Report and Order in Docket No. 14895, et al.*, 2 FCC 2d 725, 734-37, 770-78 (1966) ("*Second Report*").

The agency also concluded that the must-carry and network nonduplication rules[4] might not suffice to ameliorate the poten-

[3]The agency noted that

> [i]f the distant stations themselves were to establish a [cable] system carrying their signals, the anticompetitive character of their failure or refusal to carry the signals of local stations would be obvious. We think it no less obvious where the CATV system is independently owned.

First Report and Order in Docket No. 14895, *et al.*, 38 FCC 683, 705 (1965).

[4]The network nonduplication requirements, which were not before the court below, require cable systems upon request to delete network programs from distant stations that duplicate the broadcasts of local stations.

tial adverse economic impact of cable, and thus went on to adopt other rules limiting distant signal importation. From 1968 through 1972, the agency conducted another extensive rulemaking proceeding which resulted in new distant signal limitations and some modifications in the must-carry and network nonduplication rules. *Cable Television Report and Order*, 36 FCC2d 143, *on reconsid.*, 36 FCC2d 325 (1972), *aff'd sub nom. American Civil Liberties Union* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975). Here too the agency explained that, quite apart from questions of adverse economic impact, the must-carry rules served the objective of insuring that local stations "are not denied access to the audience they are licensed to serve. . . ." 36 FCC2d at 173.

Still later, after considering various econometric studies and "actual case" histories of stations in the several areas in which extensive distant signal carriage had been "grandfathered," the FCC, in 1980, concluded that the incremental damage to broadcast service resulting from repeal of the distant signal limitations would not be likely to jeopardize broadcast service. One principal basis for this conclusion was the agency's finding that the benefits to UHF stations (historically more vulnerable financially) of having their signals carried on local cable systems would very substantially offset, and indeed in some instances more than offset, the negative impact resulting from the importation of distant signals by those systems.[5]

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[5]As the then Chairman of the FCC put it,

> our staff has found that cable has in many cases improved the profitability of broadcast stations by improving the reception of an otherwise weak UHF signal.

Cable Television Syndicated Program Exclusivity Rules, 79 FCC2d 663, 891 (1980) *aff'd sub nom. Malrite T.V. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982) (separate statement of Charles D. Ferris, Chairman).

For a variety of reasons, including established viewer habits, poor UHF antennas, and inherent technological differences, UHF stations are at a disadvantage in competing with local VHF stations. It was thought that cable carriage would largely eliminate this so-called "UHF handicap."

Throughout this period, cable television has continued to enjoy what the agency characterized in 1965 as cable's "explosive growth." Although cable systems at that time served less than 2 million subscribers, a recently published study commissioned by the cable industry projects that by year-end 1985 some 36.9 million American households (43 percent of all households having television sets) will be subscribing to cable television; cable television annual revenues are expected to exceed $8.3 billion by that date, and to jump to more than $16 billion by 1990.[6]

Shortly after the agency's 1980 rulemaking decision, respondent Turner filed a petition with the FCC asking for yet another rulemaking proceeding, this one to delete the must-carry rules. Turner is the licensee of WTBS, an Atlanta television broadcast station that promotes itself as a "Superstation" and is distributed via satellite retransmission on many cable television systems throughout the country. Turner also originates two program services, Cable News Network ("CNN") and CNN Headline News, which it distributes primarily through cable systems. The petition contended that the rules were no longer necessary and in any event were unconstitutional abridgements of freedom of speech.

The agency, on April 6, 1984, adopted a brief order denying the Turner petition. Appendix C, pp. 69a-74a. Conceding that there were conflicting policy considerations, the FCC noted that the peculiar marketplace advantage that cable enjoys as a result of its compulsory copyright license to retransmit broadcast signals was adopted by Congress in an apparent belief that the must-carry rules would remain in place.[7]

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[6]Arthur D. Little, Inc., "Prosperity for Cable TV: Outlook 1985-1990," Report to National Cable Television Association, pp. A1-1 - A1-2 (May 1985).

[7]The order also observed that the two most significant factual developments since 1965-65, increased numbers of cable subscribers (which made the potential consequences of non-carriage more significant) and increased cable channel capacity (which renders compliance with the rules less burdensome), supported retention of the rules (A., p. 71a).

In 1979 respondent Quincy Cable TV, the operator of a cable system in Quincy, Washington, asked the FCC to waive its must-carry rules so that Quincy would not be obliged to carry the three network affiliated stations located in Spokane, Washington. At the time and well into 1984, Quincy contended that carriage of the three Spokane affiliates would require the system to drop either the distant signals of the Seattle network affiliates or other program services which Quincy thought would be more popular among subscribers than the Spokane stations. The FCC denied the Quincy petition and after various petitions for reconsideration Quincy sought judicial review. Shortly before oral argument, the lower court learned that the Quincy facilities had increased their channel capacity from 12 to 32 channels in 1982 and 1983. Thus, contrary to its claims in the court of appeals and before the agency, complying with the must-carry rules would not oblige Quincy to discontinue retransmitting or originating any other service.[8] Following a remand, the FCC reaffirmed its decision and Quincy went forward with its petition for judicial review.

The two cases, which were before the lower court pursuant to 47 U.S.C. § 402(b), were sua sponte consolidated after oral aargument. On July 19, 1985, the panel issued its decision (Appendix A) in which it concluded that the FCC failed to carry its "heavy burden" of justifying the constitutionality of the must-carry rules under the First Amendment.

Judge Wright's opinion, in which Judges Ginsburg and Bork joined, holds as an initial matter that the retransmission of broadcast signals by cable television systems is a protected First Amendment activity because it involves an exercise of "editorial discretion." *See* Appendix A, pp. 20a-21a, 36a-37a.[9] By requiring cable operators to carry the signals of local broad-

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[8]The expansions, first to 24 channels in June 1982 and later to 32 channels in January, 1983, cost the system "'approximately $250,000.'" *See Quincy VI*, Appendix D, p. 127a, 98 FCC 2d at 1289 & n.5.

[9]References to the Appendices will hereinafter be abbreviated "A." *E.g.*, A., pp. 19a-20a.

casters, the must-carry rules "coerce speech" and therefore, in the panel's view, constitute a serious deprivation of a cable system's "otherwise broad discretion to select the programming it offers its subscribers" (A., p. 37a).

Although apparently conceding that the must-carry rules are content-neutral, in the sense that the rights and obligations they create are not dependent in any way on the content of a broadcaster's programs, the lower court asserts that the rules may be more than an "incidental burden on 'speech'" (within the meaning of *United States* v. *O'Brien*, 391 U.S. 367 (1968)) because "[t]heir very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming competitive advantage [for broadcasters] over cable programmers" (A., p. 36a).

Nonetheless, the Court of Appeals states that it need not "definitively decide" whether the must-carry rules amount to more than an incidental burden on speech because the rules cannot pass muster under the *O'Brien* requirements applicable to such incidental burdens. The rules do not serve a substantial governmental interest, in the panel's view, because (1) the FCC concluded in connection with its 1980 decision to repeal the distant signal restrictions that, at least as to VHF stations, cable television posed no threat to the economic vitality of local broadcasting (A., pp. 43a-47a); and (2) in any event the FCC has failed adequately to carry "its heavy burden of justification" to show that the rules are necessary to prevent serious injury to broadcast service (A., pp. 47a-52a). Moreover, the rules fail under the *O'Brien* test, as perceived by the Court of Appeals, because the rules are "grossly overinclusive" with respect to the purpose of preventing injury to local broadcast service, inasmuch as all local stations are entitled to be carried regardless of their economic viability, their total number, and the extent to which they are in fact broadcasting local programs (A., pp. 52a-59a).

On August 2, 1985, the FCC announced that it would not seek further review of the lower court's decision. The three-

member majority explained that they supported congressional legislation to establish a new scheme of full copyright liability for cable retransmissions of broadcast signals and that such legislation was necessary to redress the "unbalanced" situation brought about by the lower court's decision. The majority rejected the possibility, left open by the Court of Appeals, of attempting to develop new must-carry rules because the majority could not "conceive of a new set of rules which would accomplish the Commission's policy goals and would meet the constitutional test outlined in the *Quincy* decision." (A., p. 138a)

REASONS FOR GRANTING THE WRIT

1. The Lower Court's Ruling That The Must-Carry Rules Are Objectionable On First Amendment Grounds Because They Interfere With The "Editorial Discretion" Of Cable Operators Should Be Reviewed By This Court Because That Ruling—

(a) Involves An Important Issue Of Constitutional Law That Ought To Be Resolved By This Court;

The must-carry rules do not forbid, deter or penalize speech by cable operators or by anyone else. Instead, the rules simply require cable operators not to impede or frustrate the access of viewers to local television stations licensed to serve local needs and interests. How the rules nonetheless infringe on First Amendment interests is therefore far from self-evident.

The court below thought that the rules impinged upon the "editorial discretion" of cable operators.[10] But this impingement is slight if not illusory. Although some systems have

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[10]The panel also sharply criticizes the rules for hampering the access that cable programmers might otherwise enjoy to cable subscribers, but appears to have done so primarily as a means of justifying the standing of Turner to complain about the must-carry rules. (*See* A., pp. 24a-25a, n.24; 36a.) In any event, the must-carry rules have no impact whatever on the program content or editorial discretion of cable programmers, and at worst have only an indirect impact on the place or manner by which the cable programmer engages in "speech".

limited channel capacity at various times, the consequence of the must-carry rules in such instances is that cable operators *either* have to forgo carrying some other program service in order to accommodate local stations *or* operators must invest in the hardware needed to increase channel capacity. Any immediate shortage of channels results not so much from the must-carry rules as from cable operators' lack of foresight as to optimal channel capacity, or perhaps a reluctance immediately to invest in greater channel capacity.

The lower court asserts that coerced speech is ipso facto an infringement on a cable operator's "editorial discretion" in light of *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). The panel regards *Tornillo* as applicable to cable television because there is an almost infinite number of cable channels and hence the so-called "scarcity rationale" does not apply to the "medium" of cable (A., pp. 28a-34a). Yet it is only the "scarcity" resulting from the operator's private decisionmaking as to what channel capacity to install that creates the possibility of the must-carry rules causing the operator to forgo transmission of other program services. It is, in short, only this privately induced "scarcity" that gives rise to the panel's First Amendment concerns.

In any event, the state statute condemned in *Tornillo* was quite different from the must-carry rules. It gave candidates for public office a right to demand that, whenever a newspaper assailed a candidate's "personal character or official record," the newspaper print the candidate's reply in as conspicuous a place and in the same kind of type as the offensive speech the statute was plainly designed to deter. 418 U.S. at 244. Thus, the statute imposed a penalty "on the basis of the content of the newspaper." 418 U.S. at 256. The obligations of the must-carry rules, in contrast, are not in any way triggered by the content of the speech, either by cable operators or by broadcasters. Rather, the rules simply prohibit cable operators from favoring some broadcast stations, whether local or distant, over other broadcast stations (the local station or stations the cable operator might elect not to carry).

The court below speculated, with some persuasiveness, that a law requiring vendors of newspapers to carry local publications, even though content neutral, would be highly suspect under the First Amendment (A., p. 37a, n.37). But the analogy begs the real issue, which is whether, with respect to its use of broadcast signals, cable television is an independent expressive activity or merely a conduit through which expressive activity passes. A railroad or trucking concern moving newspapers or books from point A to point B transports "speech" (in print form) in much the same way that a cable system retransmits the electronic speech of broadcast stations. Nonetheless, a decision holding unconstitutional under the First Amendment administrative regulations that prohibit carriers from discriminating among publisher-shippers, on the theory that those regulations "coerced speech" by the carrier, would be novel indeed.

To the extent the decisions of this Court shed light on which analogy applies to cable television retransmission of broadcast signals, they support reliance on the carrier analogy.

In 1968 this Court concluded that, unlike a broadcaster and despite its use of sophisticated technical equipment, a cable system retransmitting broadcast signals was essentially an extension of the viewer's reception equipment and thus not a program "performer" for purposes of copyright liability.[11] Subsequently, in *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), the Court extended this immunity to cable systems that were exercising the "editorial" functions of selecting for retransmission purposes several very distant signals in preference over many other less distant stations that might be carried, and were using other cable channels for the purpose of distributing non-broadcast materials. The respondent thus contended, in much the same manner as the court below reasoned in the instant case, that cable television had changed its character and could no longer be

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[11] Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968).

treated as a passive conduit. 415 U.S. at 402-04. This Court dismissed that contention as based on a

> logical flaw: in none of these operations is there any nexus with the defendants' reception and rechannelling of broadcasters' copyright materials.

Id. at 405. *Teleprompter* also rejected the notion that, in selecting among many distant broadcast signals, cable systems were taking on the attributes of broadcast stations and other originators of television service. *Id.* at 410. Congress subsequently passed new copyright legislation, but it too treats cable as more akin to a conduit than a speaker. Thus, that legislation gives cable systems a compulsory license to retransmit broadcast signals, but largely forbids any "editorial discretion" by the cable operator in terms of deleting or substituting commercial or program material or retransmitting the broadcast signal on other than a simultaneous basis.[12]

In any event, it should be this Court and not a court of appeals that decides authoritatively whether, for First Amendment purposes, the selections cable operators make among various broadcast signals is more nearly akin to the function of the newspaper of *Tornillo* (or even the newspaper vendor in the lower court's hypothetical) on the one hand, or — as this Court's copyright decisions indicate — akin to a mere carrier or conduit of expression, the conveyor belt of the printing press and not the printer.

This question is one of the utmost importance, not merely to cable operators and broadcasters but to the public as a whole. Today cable television is a multi-billion dollar industry, providing a key link between nearly half the nation's households and the television stations which thereby may or may not be available for viewing in those households.[13] Prior to the ruling

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[12]Copyright Revision Act of 1976, 17 U.S.C. §§ 111(c)(3), (e), (f) (1984).

[13]True, the panel below asserted that cable television subscribers could circumvent the cable system in order to receive signals of local stations with an alternative reception mechanism such as an outdoor antenna (A., p. 15a). As will be seen, however, this assertion has little basis in fact and is subject to serious qualification even as a theoretical matter. *See* pp. 23-24, *infra*.

below, the FCC had for some 20 years insured that cable operators would not block or impede access by their subscribers to the signals of local broadcast stations. Now, however, if the decision below stands, cable television operators will be the sole arbitrators of what television signals these millions of homes are able to watch. Moreover, since it rests squarely on constitutional grounds, the decision below indicates that the Congress, state and local governments, and the FCC are virtually helpless to insure against abuses of the gatekeeper control that cable systems exercise over a large proportion of the Nation's television service.

In upholding the FCC's authority to adopt the rules now declared unconstitutional by the court below, this Court noted that the FCC

> has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.

United States v. *Southerwestern Cable Co.*, 392 U.S. 157, 177 (1968). The court below, without any support or guidance from the decisions of this Court, has now shifted a large portion of those broad responsibilities from the FCC to cable operators. The significance of that change, given the fact that cable has now become the principal means by which some 40 percent of the population receives television signals, can scarcely be exaggerated.

(b) Is Inconsistent With the Result Reached In Several Decisions of This Court And In Direct Conflict With Decisions Of Other Lower Federal Courts;

In addition to its importance, the result reached below simply cannot be squared with various decisions by this Court involving cable television issues.

This Court in *Southwestern*, *supra*, upheld the FCC's assertion of jurisdiction because the FCC's judgments that regula-

tion was necessary were reasonable. In contrast, the Court of Appeals now holds that those agency judgments are insufficient to save the regulations from a claim that they are unconstitutional abridgements of freedom of speech. In *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972) ("*Midwest I*"), this Court upheld a regulation requiring larger cable television systems to originate some programs of their own, the theory being that that requirement served the purposes of the Communications Act by augmenting the outlets for local self-expression. Even though this mandatory origination rule was clearly much more intrusive on "editorial discretion" than are must-carry rules relating to broadcast signals, none of the three opinions in *Midwest I* so much as hints that the rule posed a First Amendment issue, although the plurality opinion notes in dicta that constitutionality of the must-carry rules has been "correctly" upheld in several courts of appeals' decisions. 406 U.S. at 659, n.17. The decision below, if allowed to stand, tells the lower courts that rules such as the one upheld in *Midwest I* must now be regarded as unconstitutional.

In *Capital Cities Cable, Inc.* v. *Crisp*, ____ U.S. ____, 104 S. Ct. 2694 (1984), the Court held that state regulations requiring cable television operators to delete advertisements for alcoholic beverages from broadcast signals carried by the cable systems were invalid under the supremacy clause, despite the broad authority reserved to the States under the Twenty-first Amendment, because the FCC's long history of regulating broadcast signal carriage by cable television systems, and more specifically its must-carry rules, established the existence of an "important and substantial" federal interest justifying preemption. 104 S.Ct. at 2708. Now, just over a year later, the rules designed to achieve that "important and substantial" federal interest have been declared invalid by the court below.[14]

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[14]The respondents in *Crisp* attempted to argue, just as the respondents in the instant case successfully argued below, that the FCC's must-carry rules are invalid under the First Amendment; but this Court refused to address that issue, noting that the cable petitioners in that case had made no such First Amendment claim and that the respondents lacked standing to do so. 104 S.Ct. at 2701 n.6.

The lower court sees some support for its result in *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1974) ("*Midwest II*"). But there, while acknowledging that the First Amendment objections to mandatory access rules discussed in dicta by the lower court were "not frivolous," this Court explained "that the asserted constitutional issue did not determine or sharply influence our construction of the statute." 440 U.S. at 709, n.19. *Midwest II* also stressed that its ruling had no adverse implications for the FCC's broadcast signal carriage rules. *Id.* at 706-07, n.16. Clearly there is an enormous gap between this "not frivolous" observation and the result reached below. Moreover, in contrast to the careful preservation in *Midwest II* of the distinction between cable retransmission of broadcast signals and cable distribution of other programming, the lower court in the present case seeks to justify its decision by rejecting, or at least ignoring, that distinction.

Besides being irreconcilable with several decisions of this Court, the lower court's holding is in direct conflict with several decisions by other federal Courts of Appeals.

The court below appears to concede that the result reached flatly contradicts *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65, 69 (8th Cir. 1968), and several other cases disparaged for being of that "early" vintage (A., p. 19a).[15] But the "more recent" cases relied upon below do not demonstrate that *Black Hills Video* and its progeny are no longer followed by other lower courts. For example, in *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (per curiam, Circuit Judges Wright and MacKinnon, and District Judge Weigel), the principal recent lower federal court case relied upon below, the D.C. Circuit held that the FCC had no jurisdic-

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[15]The list of conflicting cases is somewhat longer and not quite as ancient as the panel indicates. *Black Hills* was cited with approval in Community Communications Co. v. City of Boulder, 630 F.2d 704, 713 (10th Cir. 1980), *rev'd on other grounds*, 455 U.S. 40 (1982), and in General Telephone Co. of Southwest v. United States, 449 F.2d 846, 853 (5th Cir. 1971). *See also* Great Falls Community TV Cable Co. v. FCC, 416 F.2d 238 (9th Cir. 1969) (non-duplication rules valid).

tion to regulate the precise content of so-called pay TV channels originated for distribution primarily through cable systems. But unlike the decision below, *Home Box Office* cited the holding of *Teleprompter Corp.* v. *Columbia Broadcasting System, Inc.*, *supra*, 415 U.S. at 405, that no "nexus" exists between a cable system's retransmission of broadcast signals and its distribution of other programming (567 F.2d at 45, n.80), and took care to avoid calling into constitutional question FCC regulations pertaining to cable television use of broadcast signals.[16]

Clearly the lower courts deserve guidance as to whether *Black Hills* or the decision below is good law.[17] Only review by this Court can provide such guidance.

(c) And, If Allowed To Stand, Is Likely To Mislead Or Confuse Other Lower Courts Facing Various Other First Amendment Issues Involving Cable Television.

By extending *Tornillo's* condemnation of "coerced speech" to virtually any regulation affecting a cable television operator's

[16]In addition to *Home Box Office*, the opinion below cites three other lower federal court decisions for the very general proposition that cable operators enjoy some measure of First Amendment rights. None of those decisions, however, provides substantial support for the lower court's bold result, destroying as it does an administrative agency's regulatory scheme of some 20 years' standing. The language cited in Midwest Video Corp. v. FCC, 571 F.2d 1025, 1052-57 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979), is dicta, and relates not at all to cable carriage of broadcast signals. The other two, Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985), *jurisdictional statement filed*, No. 85-390 (Sep. 6, 1985) and Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330, 1336 (D.C. Cir. 1985) (per Wright, J.), both turning largely on the public-forum doctrine, involved restrictions on the construction of cable systems, and hence on any opportunity to use cable as a means of distributing original programming.

[17]Although a three-member majority of the FCC announced it would accept the decision below on the assumption that Congress may make appropriate changes in the copyright law, future FCC refusals to enforce the rules, whether based on the lower court's decision or some other grounds, may under 47 U.S.C. § 402(b) be reviewed in any Court of Appeals in which a petitioning party resides.

control over the use of cable channels, and by obliterating the heretofore sharp line between regulatory measures relating to cable television's use of broadcast signals and such other cable television activities as the distribution of programming originated for cable, the decision below becomes an important precedent indicating that numerous statutes and regulations that require cable television systems to surrender any hegemony over their channels run afoul of the First Amendment. Such issues are already arising in other cases, and are likely to become even more acute in the future.

Many cable television franchising authorities extract various commitments from cable television operators as a *quid pro quo* for permitting them to bury or string their cables and related equipment on public property. For example, cable operators that will not provide access channels or other program services are frequently prohibited from installing cable facilities. At least two different circuit courts have concluded that, particularly in light of cable's natural monopoly status, regulatory measures of this sort are not barred by the First Amendment. See *Omega Satellite Products* v. *City of Indianapolis*, 644 F.2d 119, 127-29 (7th Cir. 1982); *Community Communications Co.* v. *City of Boulder*, 660 F.2d 1370, 1377-80 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982). But the D.C. Circuit and the Ninth Circuit evidently disagree, in part on the theory that the property on which cable is strung or buried constitutes a "public forum" to which access can be limited or conditioned in only the most pressing of circumstances, and in part on the *Tornillo* analogy developed more fully in the decision below. *Tele-Communications of Key West, Inc.* v. *United States*, 757 F.2d 1330 (D.C. Cir. 1985); *Preferred Communications, Inc.* v. *City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985); *jurisdictional statement filed*, No. 85-390 (Sept. 6, 1985). If the decision below is allowed to stand, it will accelerate the instances in which such state, local, and sometimes federal franchise provisions are challenged as unconstitutional.

Another such issue is the constitutional question this Court noted but did not address in *Midwest II*. The Cable Communi-

cations Policy Act of 1984, 47 U.S.C. §§ 501 *et seq.*, specifically authorizes franchise authorities to establish access channels for public, educational and governmental use, and also directly imposes certain federal leased channel requirements on cable systems. Although noting that First Amendment objections have been raised with respect to access channel requirements, the legislative history indicates that Congress nonetheless chose this approach in the belief that access channel requirements could pass constitutional muster. Specifically, by fostering the availability of a "diversity of viewpoints," consistent with the goals of the First Amendment, access channel requirements were perceived by the Congress as content neutral, and otherwise permissible structural regulation. Report of the Committee on Energy and Commerce, H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 31-36 (1984). Moreover, just as this Court's decision in *Teleprompter* treats cable television as a passive conduit for purposes of broadcast signal retransmission, Congress expressed the view that

> With regard to the access requirement, cable operators act as a conduits [*sic*]. They do not exercise their editorial discretion over the programming; nor are they prevented or chilled in any way from presenting their own views and programming on the vast majority channels otherwise available to them.

Id. at 35.

The decision below flatly contradicts this Congressional statement, and rejects any distinction between the use of cable channels for broadcast and nonbroadcast purposes. It thus invites litigation challenging a recent Act of Congress, and the invitation has not gone unnoticed. *See* B. Fein, *'Quincy' Decrees First Amendment Cable Rights*, Legal Times, Aug. 12, 1985, at 10, 12 (contending access provisions in the new Cable Act must now be regarded as unconstitutional).

However, if the rationale of the court below is wrong — and only this Court can authoritatively resolve that question — the lower federal courts should be apprised of the error so that the

unconstitutionality of that statute will not be regarded as an a fortiori case based on the decision below.

2. The Lower Court's Application Of The O'Brien Test Represents Such A Departure From The Accepted And Usual Course of Judicial Proceedings As To Call For An Exercise of This Court's Supervisory Powers.

Although purporting to apply and follow *United States* v. *O'Brien*, 391 U.S. 367 (1968), the decision below is seriously in conflict with that case and with three other very recent decisions of this Court. *Members of the City Council of Los Angeles* v. *Taxpayers for Vincent*, ____ U.S. ____, 104 S. Ct. 2118 (1984); *Clark* v. *Community for Creative Non-Violence*, ____ U.S. ____, 104 S. Ct. 3065 (1984); *United States* v. *Albertini*, ____ U.S. ____, 105 S. Ct. 2897 (1985). The lower court's sweeping departure from the decisions of this Court is likely to cause serious confusion among lower federal and state courts in any case in which an administrative agency's regulations are challenged on First Amendment grounds.

O'Brien upheld the constitutionality of a statute that prohibited knowingly destroying or mutilating selective service registration certificates and of agency regulations requiring registrants to keep their draft cards in their personal possession at all times. Conceding that O'Brien's burning of his draft card in public to express his opposition to the Vietnam War was a form of speech subject to First Amendment protection, the Court nonetheless upheld *O'Brien's* conviction, explaining that a government regulation that incidentally affects speech does not violate the First Amendment if (1) the regulation is otherwise within the constitutional power of the government, (2) it furthers an important or substantial governmental interest, (3) that interest is unrelated to the suppression of free expression, and (4) the incidental restriction is no greater than is essential to the furtherance of the governmental interest. 391 U.S. at 377. In applying this test, *O'Brien* did not impose on the agency a heavy burden of demonstrating the need for the rule or contrive to fashion less speech-restrictive alternatives that

might have been adopted in lieu of the measures actually before the Court.

In *Clark* v. *Community for Creative Non-Violence*, *supra*, a majority of the D.C. Circuit, sitting en banc, had held that regulations of the United States Park Service prohibiting "camping" (and defining "camping" as including "sleeping" activities) impermissibly abridged the respondents' First Amendment rights to demonstrate by sleeping in tents erected in certain parks. In reversing, this Court held that the regulations were valid, both because they constituted reasonable restrictions on the time, place, and manner of demonstrations and because they passed muster under *O'Brien*. The less speech-restrictive alternatives suggested by the D.C. Circuit majority were said to

> represent no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that either *United States* v. *O'Brien* or the time, place, and manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

104 S.Ct. at 3072 (footnote omitted). Relying on this language, *United States* v. *Albertini*, *supra*, holds that *O'Brien* does not dictate that agency rules are invalid because less speech restrictive alternatives exist. 105 S. Ct. at 2907.[18]

Applying *O'Brien* as this Court has applied it in the foregoing cases requires no extended or difficult analysis in the case

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[18] *Taxpayers for Vincent*, *supra*, involved a municipal ordinance forbidding the use of lamp posts and street signs for the purpose of displaying messages such as support for political candidates. The municipality's interest in protecting the aesthetics of city streets was held to be sufficiently substantial to justify the ordinance even though it only "imperfectly" served the aesthetic goal.

at hand. *Southwestern* is conclusive as to the first two parts of that test, holding as it does that the must-carry rules are clearly otherwise within the constitutional (statutory) authority of the agency and that there is an important and substantial governmental interest in assuring the growth and development of local television broadcast service.[19]

The remaining two portions of the *O'Brien* test, as construed by this Court, are also easily satisfied. The purpose of the must-carry rules is clearly unrelated to the suppression of free expression; rather, the purpose is to enhance the prospects for additional outlets for speech and to prevent distortions of the competition among broadcasters by insuring that cable systems do not block or impede the access that local broadcasters would otherwise have to viewers' homes. Finally, the agency's judgment that the must-carry rules are the minimum measures necessary to maintain competitive parity between cable and broadcasting and among different broadcasters — judgments characterized as "reasonable" in *Southwestern* (392 U.S. at 173, 175) — are not to be second-guessed.

The decision below reaches the opposite result, but does so only by ignoring the letter and violating the spirit of this Court's sharply-worded admonition in *Clark*.[20]

Perhaps, as a matter of sound communications policy, the FCC's must-carry rules should be reexamined. Perhaps they ought to be modified in some respects. Perhaps, as a matter of agency discretion, if appropriate amendments to the Copyright Act were adopted, a majority of the current FCC Commissioners would even opt for repeal of the rules. But those possibilities cannot justify an interpretation of *O'Brien*

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[19]If *Southwestern* was not conclusive, the holding in *Capital Cities Cable, Inc.* v. *Crisp*, *supra*, that the must-carry rules carry out an "important and substantial" federal interest, would be.

[20]*Clark* is cited but once, and then merely as a "see also" reference following a citation to the lower court decision which it reversed (A., p. 52a). The lower court's opinion similiarly contains one passing reference to dicta in *Albertini* (*Ibid.*), while the holding of that case is ignored.

that has the consequence of turning a reviewing court, whenever faced with First Amendment claims, into a super-agency that is entitled to substitute its judgment concerning the appropriateness of agency rules. That is what happened here, and is likely to happen again if the decision below is allowed to stand.

3. The Lower Court's Action In Resolving The Ultimate Substantive Constitutional Issues Without The Benefit Of A Full-Fledged Agency Rulemaking Proceeding Raises Serious Issues Concerning the Proper Scope of Judicial Review That Warrant Examination By This Court.

Neither of the petitions for review before the lower court required the wide-ranging constitutional judgments rendered by the panel. *Quincy* is not a case in which the facts support the theoretical possibility that the must-carry rules could interfere with cable origination speech. Quite the contrary, the cable operator had made the capital investment necessary to expand its channel capacity, thereby eliminating the dilemma that constitutes the predicate for its constitutional claims. *Turner* came before the lower court on an agency denial of a request to initiate a rulemaking proceeding, a matter normally regarded as involving a very substantial degree of agency discretion and hence a very narrow scope for judicial review. *E.g.*, *WWHT, Inc.* v. *FCC*, 656 F.2d 807, 818 (D.C. Cir. 1981) (per Edwards, J.; "[i]t is only in the rarest and most compelling of circumstances that this court has acted to overturn an agency judgment not to institute rulemaking"). Even in those most rare and compelling of cases, the remedy for agency error would be an order requiring the agency to conduct rulemaking proceedings. *Geller* v. *FCC*, 610 F.2d 973 (D.C. Cir. 1979).

Here, however, the D.C. Circuit went far beyond anything that even its own generous precedents would support. Instead of directing the FCC to revisit the need for the existing must-carry rules, the panel in effect conducted its own rulemaking proceeding, finding facts, assessing industry trends, and resolving various judgmental issues in the process. In reviewing

a district court's dismissal of a complaint for failure to state a cause of action a court of appeals may well adopt a different view of the law, but that does not authorize the appellate court's concurrently conducting its own truncated trial on the merits and then entering a final judgment in favor of the plaintiff. *Cf. Tele-Communications of Key West, Inc.* v. *United States*, 757 F.2d 1330 (D.C. Cir. 1985) (per Wright, J.; reversing and remanding a dismissal of a complaint alleging that the government's refusal to permit installation of cable television facilities deprives the plaintiff of First Amendment rights). Yet, in the context of review of agency action, that is precisely what the lower court did in this case, finding on its own such facts as it regarded as dispositive and then declaring on the basis of those findings that the 20 year old agency rules are now unconstitutional.

Quite apart from its unfairness to interested parties who had no reason to think (at least until the decision below) that complete factual showings on the merits need be made in responding to requests to conduct rulemaking proceedings, the panel's bold approach creates a significant risk of serious judicial blunders, for appellate courts are ill-equipped to conduct fact-finding, particularly on complex, technical matters. The opinion below provides a wealth of examples to support this point.

The lower court finds that broadcast stations are "capable of bypassing the cable system altogether" (A., p. 39a), because a so-called A/B switch may be installed at the VHF terminals enabling the homeowner to receive channels 2-13 without the aid of cable, and because cable facilities are not attached to the UHF terminals on the back of the receiver (A., pp. 14a-15a). But it is the FCC, not the panel, that should assess such matters. *E.g., Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). Here the agency's assessment on A/B switches was quite different,[21] and the facts are by no means as

[21] In denying the Turner petition, the FCC said its "extensive experience" indicated that "even relatively minor receiver/tuner obstacles to reception may create significant impediments to viewing of stations and thus have substantial impact on their economic viability" (A., p. 71a).

simple as the panel assumed them to be.[22]

The panel's free-wheeling assessment of factual issues even results in its reliance on inconsistent factual assertions. Thus, to bolster the claim that the rules seriously impair the editorial discretion of cable operators, the lower court cites trade press data indicating that cable channel capacity is rather limited (A., p. 10a & n. 9). Yet, in the same breath, to support the contention that the so-called scarcity rationale is inapplicable to cable, the panel embraces assertions in the academic literature that cable has "almost infinite" channel capacity (A., pp. 9a-10a & n. 8, 30a-31a).[23]

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[22]For example, an A/B switch will *not* suffice to circumvent cable reception whenever the homeowner has a video cassette recorder attached to the television receiver, or the receiver is a so-called "cable ready" model. VCRs and "cable ready" television receivers, both of which are in increasingly widespread use today, were ignored in the lower court's analysis of the facts. Further, the UHF terminals at the rear of most receivers provide no solution to the difficulty of obtaining good picture quality for a local UHF station with only a six-inch "loop" antenna that typically is sold with the receiver, so that it is simply fatuous to say that those terminals substantially mitigate the obstacles cable creates for any UHF station that the system declines to carry.

[23]The panel's treatment of the scarcity rationale is also unpersuasive. Under long established FCC rules, no one person may own (and thereby control the content of) two or more television stations serving the same area; but under the panel's decision a single cable operator not only controls all of the channels delivered by the system (whether it be 12 or 200 channels) but also is immune under the First Amendment from must-carry regulations designed to insure that the cable operator does not block or impede the subscribers' access to local broadcast stations.

Perhaps recognizing its vulnerability on the scarcity question, the panel opinion goes on to consider — without the slightest basis in the agency's findings for doing so — whether cable television has the attributes of a natural monopoly. (A., pp. 32a-33a.) The panel thinks not, but admits its view on this question conflicts with Judge Posner's decision in Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982); to justify its rejection of *Omega*, the panel relies on an academic article written 12 years earlier by then Professor Posner. (*Id.*) Other more recent commentators express little doubt on the natural monopoly point. *Cf.* 1 C. Ferris, F. Lloyd, T. Casey, *Cable Television Law* ¶ 13.15[3] at 13-95 (1985) ("there seems little reason to give an enforceable legal monopoly to a cable operator who may already have a *de facto* natural economic monopoly"), and authorities cited therein.

More importantly, the lower court's opinion treats the issue of potential adverse economic impact as the sole basis and purpose of the must-carry rules (A., pp. 13a-16a). However, that simply is not so, as the agency's 1965 and 1966 rulemaking decisions demonstrate. *See* p. 3, *supra*. The policies of assuring that the access of cable subscribers to local stations is not impeded, of insuring that cable does not inflict a competitive disadvantage on local station A vis-a-vis local stations B and C by carrying only the latter, and of creating rights to carriage (and to nonduplication of network programs) to offset the unfair competitive advantage cable enjoys from not having to bargain for the right to use the programs of broadcast stations, are not in any way dependent on a threat of serious economic injury to broadcasting.

The panel professes an inability to appreciate the interrelationship between FCC regulatory and copyright issues (A., pp. 41a-42a, n. 42). However, Congress has not overlooked that interrelationship.[24] The panel's cavalier dismissal of the interrelationship of the copyright and regulatory issues leads to its conclusion that the must-carry rules favor one class of

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[24]Section 624(f)(2) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 544(f)(2), takes great care not to disrupt the FCC rules declared unconstitutional by the decision below. *See* Report of Committee on Energy and Commerce, H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 70 (1984). As the Senate Committee explained,

> Given the current compulsory licensing scheme for cable systems under the copyright laws, if the "must carry" rules were eliminated, local cable operators might not carry some local broadcast stations, or would be in a position to charge an unreasonable price to let a broadcaster on their systems.
>
> The committee recognizes the importance of local programing [*sic*] and opposes anything that would undercut that service. While the committee believes that the answer to this issue may ultimately be found in the marketplace, under the current regulatory framework and existing copyright law, the committee sees a need to continue the existing 'must carry' rules to protect the public interest. Of course, the FCC may need to update these rules to resolve problems that may arise.

S. Rep. No. 98-67, 98th Cong., 1st Sess. 11-12 (1983).

conclusion that the must-carry rules favor one class of "speakers" (local broadcasters) over another (cable programmers) (A., p. 36a). That conclusion fails to take into account the critical fact that the copyright laws do the same thing, only in reverse.[25]

Finally, with a full-fledged rulemaking directed at the issues of concern to the lower court, the panel might not have erroneously concluded that the FCC's extensive analyses of the need for restrictions on cable television importation of distant broadcast signals indicate that the must-carry rules serve no legitimate purpose. The fact is that the decision to repeal the distant-signal rules was very largely predicated on the assumption that UHF stations would benefit from cable carriage, and that this benefit would very largely offset the impact of distant-signal importation. *E.g.*, *CATV Syndicated Program Exclusivity Rules*, 79 F.C.C. 663, 745, 891 (1980), *aff'd sub nom. Malrite T.V.* v. *FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

Without must-carry rules, the assumption that UHF stations will reap benefits from being carried on cable loses all validity.

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[25]By making cable usage of the product of cable programmers subject to normal copyright liability, while giving cable systems a compulsory copyright license to retransmit broadcast signals, the current Copyright Act "discriminates" in favor of cable programmers by giving them the ability to withhold programming from cable, and thus the basis from which to negotiate a reasonable accommodation with cable systems.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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September 23, 1985

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

No. 83-1283

QUINCY CABLE TV, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents*

KHQ, INCORPORATED,
SPOKANE TELEVISION, INC.,
KING BROADCASTING COMPANY,
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS,
NATIONAL ASSOCIATION OF BROADCASTERS,
TOWN OF QUINCY, WASHINGTON,
Intervenors

AND CONSOLIDATED CASE No. 83-2050

ORDER

[Filed July 19, 1985]

It is ORDERED, *sua sponte,* that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

For The Court

George A. Fisher
Clerk

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1283

QUINCY CABLE TV, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

KHQ, INCORPORATED,
SPOKANE TELEVISION, INC.,
KING BROADCASTING COMPANY,
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,
NATIONAL ASSOCIATION OF BROADCASTERS, and
TOWN OF QUINCY, WASHINGTON, INTERVENORS

No. 83-2050

TURNER BROADCASTING SYSTEM, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

METROMEDIA, INC.,
COMMUNITY ANTENNA TELEVISION ASSOCIATION, INC.,
BLACK ENTERTAINMENT TELEVISION,

NATIONAL RELIGIOUS BROADCASTERS,
TELEVISION LICENSEES,
ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.,
CORPORATION FOR PUBLIC BROADCASTING,
NATIONAL ASSOCIATION OF BROADCASTERS,
SPANISH INTERNATIONAL COMMUNICATIONS
CORPORATION *et al.*,
NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS,
COLUMBUS BROADCASTING COMPANY, INC. *et al.*,
KING BROADCASTING COMPANY,
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,
MCGRAW-HILL BROADCASTING COMPANY, INC. *et al.*,
NATIONAL BROADCASTING COMPANY, INC.,
STATION REPRESENTATIVES ASSOCIATION,
TAFT TELEVISION AND RADIO COMPANY, INC., and
MARANATHA BROADCASTING COMPANY, INC., INTERVENORS

Petitions for Review of Orders of the
Federal Communications Commission

Argued April 16, 1985

Decided July 19, 1985

John P. Cole, Jr., with whom *David M. Silverman* was on the initial and supplemental briefs, for Quincy Cable TV, Inc., petitioner in No. 83-1283. *Mr. Cole* also entered an appearance for Town of Quincy, Washington, intervenor in No. 83-1283.

Bruce D. Sokler, with whom *Charles D. Ferris*, *Frank W. Lloyd*, and *L. Gregory Ballard* were on the brief, for Turner Broadcasting System, Inc., petitioner in No. 83-2050.

Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, for respondents in Nos. 83-1283 and 83-2050. *Bruce E. Fein*, then General Counsel, Federal Communications Commission, was on the initial brief for respondents in No. 83-1283 and on the brief for respondents in No. 83-2050. *Gregory M. Christopher*, Attorney, Federal Communications Commission, was on the intial brief for respondents and the Supplemental Brief for Respondents, Intervenors, and Amici Curiae pursuant to Court Order of October 16, 1984 in No. 83-1283, and entered an appearance for respondent Federal Communications Commission in No. 83-2050. *Robert G. Nicholson* and *Margaret G. Halpern*, Attorneys, Department of Justice, were on the initial brief for respondents and the Supplemental Brief for Respondents, Intervenors, and Amici Curiae in No. 83-1283, and on the brief for respondents in No. 83-2050. *J. Paul McGrath*, Assistant Attorney General, was on the Supplemental Brief for Respondents, Intervenors, and Amici Curiae in No. 83-1283 and on the brief for respondents in No. 83-2050. *Jack D. Smith*, General Counsel, Federal Communications Commission, was on the Supplemental Brief for Respondents, Intervenors, and Amici Curiae in No. 83-1283. *Jane E. Mago* and *C. Grey Pash, Jr.*, Attorneys, Federal Communications Commission, entered appearances for respondent Federal Communications Commission in No. 83-2050.

J. Laurent Scharff, with whom *James M. Smith* was on the initial and supplemental briefs in No. 83-1283 and on the brief in No. 83-2050, for Association of Independent Television Stations, Inc. and National Association of Broadcasters, intervenors in Nos. 83-1283 and 83-2050, and for Association of Maximum Service Telecasters, Inc., McGraw-Hill Broadcasting Company, Inc., Metromedia, Inc., National Broadcasting Company, Inc., and Taft Television and Radio Company, Inc., intervenors in No.

83-2050. *Jonathan D. Blake, Paul J. Berman,* and *Gregory M. Schmidt* entered appearances for intervenor Association of Maximum Service Telecasters, Inc. *Arthur B. Goodkind* and *Mary M. Hendriksen* entered appearances for intervenors McGraw-Hill Broadcasting Company, Inc. *et al. Howard Monderer* entered an appearance for intervenor National Broadcasting Company, Inc. *Erwin G. Krasnow* and *Michael D. Berk* entered appearances for intervenor National Association of Broadcasters.

Arthur Stambler, Erwin G. Krasnow, Michael D. Berg, Edward W. Hummers, Jr., and *David G. Rozzelle* were on the brief for Spokane Television, Inc., intervenor in No. 83-1283, and National Association of Broadcasters and King Broadcasting Company, intervenors in Nos. 83-1283 and 83-2050.

R. Russell Eagan was on the brief for KHQ, Incorporated, intervenor in No. 83-1283.

John Geoffrey Bentley was on the brief for Maranatha Broadcasting Company, Inc., intervenor in No. 83-2050. *Laura Metcoff Klaus* entered an appearance for this intervenor.

Norman P. Leventhal, Meredith S. Senter, Jr., and *Barbara K. Kline* were on the brief for Spanish International Communications Corporation *et al.*, intervenors in No. 83-2050.

Stephen R. Effros was on the brief for Community Antenna Television Association, Inc., intervenor in No. 83-2050.

Debra Lee Carter was on the brief for Black Entertainment Television, intervenor in No. 83-2050. *Steven Reed* entered an appearance for this intervenor.

Brenda L. Fox, Carol A. Melton, Robert St. John Roper, and *Michael S. Schooler* were on the brief for Na-

tional Cable Television Association, Inc., intervenor in No. 83-20[illegible]0.

Baryn S. Futa and *Susan Dillon* were on the brief for Corporation for Public Broadcasting and National Association of Public Television Stations, intervenors in No. 83-2050.

Edward W. Hummers, Jr., *David G. Rozzelle*, and *Robert A. DePont* entered appearances for King Broadcasting Company, intervenor in Nos. 83-1283 and 83-2050.

Lawrence A. Horn, *Nancy H. Hendry*, *Eric H. Smith*, and *Lewis J. Papers* were on the brief for Corporation for Public Broadcasting *et al.*, *amici curiae* in No. 83-1283, urging affirmance. *Robert S. Blacher* entered an appearance for these *amici*.

Daniel J. Popeo and *Michael P. McDonald* were on the brief for American Legal Foundation, *amicus curiae* in No. 83-2050, urging reversal.

Before WRIGHT, GINSBURG, and BORK, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: FCC regulations require cable television operators,[1] upon request and without compensation, to transmit to their subscribers every over-the-air

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[1] The terms "cable television operator" or "cable system" refer to the entity that physically delivers video signals via coaxial cable into the homes and offices of its paying subscribers. A "cable programmer," in contrast, is an independent service that provides cable operators with programming to transmit over their systems. For cable programmers to reach their intended audience they must obtain access to a channel on a cable system. Typically, most of a cable operator's viewing fare consists of programming provided by cable programmers and retransmission of local over-the-air broadcast signals. *See* note 2 *infra*.

television broadcast signal [2] that is "significantly viewed in the community" or otherwise considered local under the Commission's rules. 47 C.F.R. §§ 76.57-76.61 (1984). Alleging that these mandatory carriage or "must-carry" rules violate the First Amendment rights of cable programmers, cable operators, and the viewing public, Turner Broadcasting Systems, Inc. (TBS), the owner of a variety of cable services,[3] petitioned the FCC to institute rulemaking procedures to delete the offending regulations.[4] Although acknowledging that the challenged rules deprive cable programmers of access to some audienes and "compel carriage of broadcast signals in place of alternate programming that subscribers, if given a choice, might otherwise choose," the Commission denied TBS's petition. *Memorandum Opinion and Order*, FCC 84-136, April 6, 1984 (hereinafter *Opinion and Order*), at 3, Joint Appendix to No. 83-2050 (*Turner* JA) at 3. TBS now petitions for review of that denial. In a separate action, Quincy Cable Television, Inc. (Quincy), the operator of a cable system in Quincy, Washington, petitions for review of an FCC order requiring it to

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[2] The term "broadcast television" refers to conventional commercial or public television, the signals of which are transmitted "over the air" to the viewer's television set.

[3] Among TBS's many holdings are Cable News Network (CNN) and CNN Headline News. CNN provides 24-hour news programming and is currently available on over 4,800 of the nearly 6,200 operational cable systems across the country. SATELLITE SERVICES REPORT, May 1984, *reproduced as* Appendix to brief for National Cable Television Association, Inc., intervenor in No. 83-2050. CNN Headline News, currently picked up by 1,200 cable systems, provides continuous summaries of national and international news. *Id.*

[4] Petition for Rulemaking filed by Turner Broadcasting System, Inc., October 15, 1980, Joint Appendix to No. 83-2050 (*Turner* JA) at 5-17.

carry the signals of several local broadcast stations and imposing a $5,000 "forfeiture" for its failure to do so.[5]

In the course of reviewing those petitions, we have concluded and now hold that the must-carry rules are fundamentally at odds with the First Amendment and, as currently drafted, can no longer be permitted to stand.

I. Background

The Supreme Court has repeatedly stressed that "[e]ach medium of expression * * * must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975). *See also Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (plurality opinion). Mindful that in applying the broad principles of the First Amendment to new media we must remain sensitive to the "differing natures, values, abuses and dangers" of each method of expression, *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring), we examine in detail the nature of cable television technology, the history and purposes of the FCC's regulation of that technology, and prior judicial assessments of the constitutionality of that regulation.

A. *Cable Television Regulation and the Origins and Purposes of the Must-Carry Rules*

1.

Cable television and ordinary commercial broadcast television operate on the basis of wholly different techni-

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[5] Although the cases come to us in different procedural postures, Quincy and TBS mount virtually identical First Amendment challenges. Accordingly, we find it the most efficient course to consolidate the petitions on our own motion and address the constitutionality of the must-carry rules in the same opinion.

cal and entrepreneurial principles. *See generally Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694, 2701 (1984). Conventional broadcasters radiate electromagnetic waves from a transmitting antenna. The waves are intercepted by the viewer's television receiver, typically via a rooftop antenna, and decoded to produce a video image. Broadcasters derive their revenues not by selling the signal to the viewer but by selling time to advertisers.[6] As a general rule, the larger the audience the greater the rate the broadcaster can charge.

In contrast, cable operators charge subscribers a fee for the right to view programming from a variety of broadcast and non-broadcast sources.[7] Although cable systems frequently have the capacity to originate programming, most of their viewing fare consists of retransmission of signals generated by independent entities. Typically, the system offers local over-the-air broadcast signals captured by a strategically located master antenna, distant broadcast signals, which are often imported via satellite, and non-broadcast signals transmitted exclusively to cable systems by satellite or microwave relay. The cable operator converts the signal received from these or other sources into an electronic impulse and delivers it to subscribers' homes over a coaxial cable. Because the cable signal reaches the home by wire and not via the physically limited electromagnetic spectrum, cable systems have the potential, often unrealized, to transmit many more signals than the

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[6] In contrast to commercial broadcasters, public broadcasting stations derive their operating revenues from grants and contributions.

[7] Cable programmers derive revenues in a variety of ways. Many charge the cable systems that transmit their programming a small fee per subscriber. A few charge the subscriber a monthly fee in addition to that owed to the operator for basic cable service. Finally, a substantial number of cable programmers sell advertising time. *See* SATELLITE SERVICES REPORT, *supra* note 3.

airwaves can support. Some new or recently upgraded systems have the capacity to offer more than 100 channels.[8] More currently operational systems, however, can carry far fewer, typically from 12 to 36.[9]

Although initially reluctant to exercise jurisdiction over cable, by the mid-1960's the FCC had changed its position and undertook comprehensive regulation of the budding industry. *See generally United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (canvassing early history of FCC regulation of cable); D. LE DUC, CABLE TELEVISION AND THE FCC (1973). Fully recognizing that the statutory basis for its jurisdiction was far from explicit, the Commission nonetheless believed that oversight was imperative lest the "explosive" growth of the cable industry undermine the regulatory framework already established for ordinary broadcast television. *Rules re Microwave-Served CATV, First Report and Order in Docket No. 14895*, 38 FCC 683, 685, 697-716 (1965) (*First Report and Order*); *CATV, Second Report and Order in Docket No. 14895*, 2 FCC2d 725 (1966) (*Second Report and Order*).

The Commission's objective was not merely to protect an established industry from the encroachment of an upstart young competitor, although such a result was clearly the byproduct of the regulatory posture that de-

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[8] The Commission suggests that some currently operational systems have the capacity for 200 channels. Brief for respondents in No. 83-2050 at 4. *See also* Note, *Cable Television and Content Regulation: The FCC, the First Amendment and the Electronic Newspaper*, 51 N.Y.U. L. REV. 133, 135 (1976) (*Electronic Newspaper*) (describing potential channel capacity as "almost infinite").

[9] Despite the widely held notion that cable systems have a virtually unlimited channel capacity, 38.7% of such systems have fewer than 20 channels. *Communications Daily*, June 1, 1984, at 4. Indeed, 12.4% of cable subscribers are served by systems with 12 or fewer channels. Brief for respondents in No. 83-2050 at 38 n.27, *citing Television and Cable Factbook*, Cable & Services Volume at 1726 (1984).

veloped.[10] Rather, the Commission took the position that without the power to regulate cable it could not discharge its statutory obligation to provide for "fair, efficient, and equitable" distribution of service among "the several States and communities." 47 U.S.C. § 307(b) (1982). *See First Report and Order*, 38 FCC at 699; *Second Report and Order*, 2 FCC2d at 734-737. If permitted to grow unfettered, the Commission feared, cable might well supplant ordinary broadcast television. A necessary consequence of such displacement would be to undermine the FCC's mandate to allocate the broadcast spectrum in a manner that best served the public interest. In particular, if an unregulated, unlicensed cable industry were to threaten the economic viability of broadcast television, the Commission would be powerless to effect what it saw (and continues to see) as one of its cardinal objectives: the development of a "system of [free] local broadcasting stations, such that 'all communities of appreciable size [will] have at least one television station as an outlet for local self-expression.'" *United States v. Southwestern Cable Co.*, 392 U.S. 157, 174 (1968), *quoting* H.R. Rep. No. 87-1559, 87th Cong., 2d Sess. 3 (1962).

2.

Almost from the beginning, the must-carry rules were a centerpiece of the FCC's efforts to actively oversee the growth of cable television.[11] Then, as now, the ap-

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[10] Some analysts have taken a harsher view of the FCC's early regulatory posture. *See, e.g.*, H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 22 (1984) ("FCC policies in [the] 1960s and early 1970s unfairly inhibited the growth and development of cable."); Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 MICH. L. REV. 1, 40 (1976) ("There is considerable evidence that the Commission has been more concerned with protecting the economic interests of conventional broadcasters than with fully exploiting the resources of cable technology.").

[11] The Commission first sought to impose a must-carry requirement in 1962 as a condition for granting an application

plicability of the rules varied according to such factors as the quality of the broadcast signal available in the community. In general, however, the rules required cable operators, upon request, to carry any broadcast signal considered local under the Commission's complex formula.[12] Affected parties could petition for a waiver from their must-carry obligations,[13] but the rules themselves

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to construct a microwave system to transmit distant signals to a rural cable system. *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962), *aff'd*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). In 1965 the requirement was applied to all microwave-fed systems. *First Report and Order*. A year later the FCC extended mandatory carriage obligations to all cable systems that carried at least one broadcast signal regardless of the means used to obtain that signal. *Second Report and Order*.

[12] For the current formulation, *see* 47 C.F.R. §§ 76.5 76.51, 76.53, 76.55, 76.57, 76.59, 76.61 (1984). In general, the rules require a cable system to carry the signals of all commercial television stations within 35 miles of the community served by the system, other stations in the same television market (as designated by the Commission), and all stations "significantly viewed in the community." The rules vary according to the size of the market in which the cable system is located. Quincy, Washington, for example, is considered to be "outside all major and smaller television markets." Accordingly, it was subject to 47 C.F.R. § 76.5.

Until recently a cable operator's must-carry obligation arose only if it elected to transmit at least one broadcast signal. *See* 47 C.F.R. § 76.5(a). Under the Commission's newly revised definition, however, carriage of local stations is mandatory even if the operator otherwise carries no broadcast signals. *See Report and Order*, FCC 85-179, April 11, 1985, at 7, 10. Ironically, under the revised approach cable systems that carry only broadcast signals will not be subject to the must-carry rules. *Id.*

[13] The current waiver provision is codified at 47 C.F.R. § 76.7. In general, the Commission has granted waivers extremely sparingly. For a rare example, *see Group W Cable Inc.*, 57 Rad. Reg. (P&F) 637, 640 (1984). *See generally In the Matter of Rules and Regulations With Respect to "Sat-*

drew few lines. They required carriage of every local or significantly viewed signal irrespective of the number of must-carry channels already being transmitted, the degree of programming duplication, or the channel capacity of a cable system.

Although the economic analysis initially advanced in support of the must-carry rules was somewhat complicated, the Commission's general objective was straightforward: to assure that the advent of cable technology not undermine the financial viability of free, community-oriented television. If cable were to "drive out television broadcasting service," the Commission reasoned, "the public as a whole would lose far more—in free service, in service to outlying areas, and in local service with local control and selection of programs—than it would gain." *First Report and Order*, 38 FCC at 700. The must-carry rules, together with a comprehensive body of related regulations, would channel the development of the nascent cable industry to limit the risks it might pose to conventional broadcasting, "society's chosen instrument for the provision of video services." *Inquiry Into the Economic Relationship Between Broadcasting and Cable Television*, 71 FCC2d 632, 644 (1979) (*Economic Inquiry Report*).

At the time of the initial promulgation of the rules, the Commission acknowledged that it had insufficient data to "predict with reliability" the extent of the risk posed by cable. *First Report and Order*, 38 FCC at 711. *See also Second Report and Order*, 2 FCC2d at 744-745. But the economic analysis posited by the broadcasting industry (and now espoused by the Commission [14])

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urated" Cable Television Systems, 66 FCC2d 710, 713-714 (1977) (*Saturated System Rulemaking*) (absent a "compelling showing" waiver will not be granted even if mandatory carriage obligations result in deletion of discretionary signals).

[14] Brief for respondents in No. 83-2050 at 6.

painted a dire picture. *First Report and Order*, 38 FCC at 689. The profitability of local commercial television is dependent on advertising revenues, which in turn are dependent on the number of viewers in the audience. Self-evidently, an advertiser will pay less per unit of air time as viewership decreases. If a significant percentage of viewers subscribe to cable *and* if subscribers view cable to the exclusion of broadcast television, the audience will become fragmented. "A gain of a subscriber to the [cable] system will in most cases mean the effective loss of a potential viewer for the local station." *Id.* at 703. With access to a smaller (often less affluent) market, advertisers will pay less for air time and profits will decline, a consequence that both discourages others from seeking a broadcast license and, in the extreme case, might even result in financial failure of some existing stations. Only if local broadcasters were assured access to the whole of their allocated audience, the FCC believed, could the risk of audience fragmentation and the concomitant threat to free, local television be forestalled.

A central premise of this analysis was that a significant proportion of cable subscribers would cease to view local television unless such signals were carried by the cable system. At first blush, as the cable industry vigorously pointed out, this assumption was somewhat counterintuitive. Almost without exception, the must-carry rules only mandate carriage of signals that can already be picked up off the air.[15] Although the cable attaches to the television set through the VHF outlet, an inexpensive switch (the "A/B switch") would enable a viewer

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[15] *But see Amendment of the Commission's Rules Regarding Major Television Markets*, 50 Fed. Reg. 2565, 2568-2569 (Jan. 17, 1985) (to be codified at 47 C.F.R. § 76.51); *see also* 57 Rad. Reg. (P&F) 1061 (dissenting statement of Commissioner Patrick).

to alternate between cable and off-air VHF signals.[16] Indeed, connection of the cable typically has no direct effect at all on receipt of UHF signals.[17] Thus, in principle, a cable subscriber with little or no effort could still view local broadcasts even without the benefit of the must-carry rules. If that were the case, cable's gain would not necessarily mean broadcast television's loss, and the Commission's reasoning would be deprived of its major premise.

But, as the FCC pointed out when it first enacted the rules, the technical availability of off-air signals does not necessarily defeat the assumption that without the must-carry rules a significant number of cable subscribers might curtail their viewing of local broadcast television. Even so minor a task as flicking an A/B switch, the Commission suggested, "is an obvious deterrent to its use." *First Report and Order*, 38 FCC at 702. Moreover, with or without a switch local signals are available to the subscriber only if the antenna remains attached. Yet, the Commission observed, one of the main selling points of cable is the prospect of dispensing with unsightly or expensive antennas. *Id.* at 702 n.25. Finally, even if the antenna remains in place, cable retransmission of UHF signals usually provides a far clearer picture than is available off-air. Thus, the Commission suggested, without the benefit of must-carry UHF stations would be at a significant competitive disadvantage. *Economic Inquiry Report*, 71 FCC2d at 713; *see also Cable Television Program Syndicated Exclusivity*

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[16] One version of the switch is currently available for $4.95. *Turner* JA at 124.

[17] *See* G. SHAPIRO, P. KURLAND & J. MERCURIO, CABLESPEECH: THE CASE FOR FIRST AMENDMENT PROTECTION 144 (1983) (CABLESPEECH); *Petition of Quincy Cable TV, Inc. dated November 19, 1979, reproduced in* Joint Appendix to No. 83-1283 (*Quincy* JA) at 13.

Rules, 79 FCC2d 663, 718 (1980) (*Syndicated Exclusivity Rules.*)

In sum, at the time of their original promulgation the Commission viewed the must-carry rules as critical stones in the regulatory bulwark erected to guard against destruction of free, community-oriented television. By forcing cable systems to carry local and significantly viewed broadcast signals, the Commission sought to channel the growth of cable in a manner consistent with the public's interest in the preservation of local broadcasting.

3.

When it first promulgated the must-carry rules in the mid-1960's, the Commission recognized that it could not prove the factual predicates of its analysis. Although frankly relying on its "collective instinct" and "intuition," *Inquiry Into Economic Relationship Between Television Broadcasting and Cable Television*, 65 FCC2d 9, 14 (1977) (*Notice of Inquiry*), it concluded that it would be inconsistent with its responsibilities to "withhold[] action until indisputable proof of irreparable damage to the public interest in television broadcasting has been compiled—i.e., by waiting 'until the bodies pile up' before conceding that the problem exists." *First Report and Order*, 38 FCC at 701.

In the ensuing years the Commission has repeatedly repromulgated and fine-tuned the must-carry rules. *See Commission Proposals for Regulation of Cable Television*, 31 FCC2d 115, 118-120 (1971); *Cable Television Report and Order*, 36 FCC2d 143, 173-176 (1972). It has, however, never reconsidered or seriously questioned the elaborate and concededly speculative premises on which its economic defense of the rules rests.[18]

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[18] The Commission acknowledged as much in its order denying TBS's petition. *Opinion and Order, Turner* JA at 3. However, fundamentally inverting the burden of justification

This approach is in sharp contrast to the Commission's treatment of several other components of the regulatory framework imposed in the early years of its regulation of cable television. After conducting a comprehensive economic analysis based on a detailed and highly sophisticated examination of a number of discrete television markets, the Commission eliminated the distant-signal-carriage and syndicated-exclusivity rules.[19] Like the must-carry rules, the deleted regulations were originally promulgated to protect broadcast television from competition from the expanding cable industry. *See Economic Inquiry Report; Syndicated Exclusivity Rules* (deleting syndicated-exclusivity and distant-signal rules).

In the context of this wide-ranging deregulatory effort, the Commission acknowledged a radical shift in its perception of the role of cable in the array of viewing options available in a given community. Abandoning its initial view of cable as an auxiliary service that merely supplemented broadcasting by improving reception in outlying areas, the Commission now recognized cable as a legitimate, independent vehicle for providing alternative video services to the public. *Economic Inquiry Report*, 71 FCC2d at 645-646. With respect to the specific question of the continued value of the distant-signal and

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for regulations that impinge on First Amendment freedoms, the Commission faulted TBS for its failure to provide economic data on the possible effect of deleting or modifying the rules.

In the *Second Report and Order* the Commission did look at studies suggesting, for example, a general pattern of growth in the number of homes served by cable. 2 FCC2d at 738-744. But, because of their incompleteness, the Commission concluded that such studies were of "limited value." *Id.* at 744.

[19] The distant-signal rules limited the number of distant signals a cable operator could import into its market. The syndicated-exclusivity rules limited the carriage of particular programs on those imported distant signals. *See generally Cable Television Report and Order*, 36 FCC2d at 170-185.

syndicated-exclusivity rules, the Commission found that its general economic analysis had failed to substantiate the intuitive fears on which the rules had been premised since the mid-1960's.

> Upon examination of the economic evidence, we conclude that competition from cable television does not pose a significant threat to conventional television or to our overall broadcasting policies. * * * [A]udience losses attributable to increased competition from cable television take place in a context of offsetting factors. Increases in population and in the level of economic activity result in a fairly steady growth in the demand for advertising exposures and in station revenues. Thus, the ability of stations to maintain existing levels of service to their communities is likely to be unimpaired in the absence of our distant signal carriage rules.

Id. at 661. Stating that the comprehensive nature of its analysis enabled it to speak "with a clarity[] which is uncommon in matters of public policy," the Commission found that "continued regulatory intervention is not merely unnecessary, it is counterproductive." *Id.* at 659.

B. *Prior Constitutional Challenges to Cable Regulations*

On several occasions the Supreme Court has addressed questions concerning the breadth of the FCC's jurisdiction over cable television. *See United States v. Southwestern Cable Co., supra,* 392 U.S. at 178 (generally approving FCC jurisdiction over cable if "reasonably ancillary" to its regulation of broadcast television); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest I*) (finding rule requiring cable operators to originate local programming within FCC's jurisdiction); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Midwest II*) (striking down as beyond the FCC's jurisdiction rules requiring cable operators to make channels available for local access). *See also Capital Cities Cable, Inc. v. Crisp, supra,* 104 S.Ct. 2694 (discussing federal

preemption of state laws regulating cable). However, in marked contrast to the extensive First Amendment jurisprudence developed in the context of the broadcast media, *see, e.g., FCC v. League of Women Voters of California*, 104 S.Ct. 3106 (1984); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Court has never confronted a challenge to the constitutional validity of the must-carry rules or any other regulation affecting cable television.[20]

In the lower federal courts questions concerning the constitutionality of various cable regulations arose almost from the first moment the Commission asserted its regulatory jurisdiction over the industry. The initial challenges, which were brought when cable was in its infancy and apocalyptic visions of its impact were common, met with little success. *See, e.g., Titusville Cable TV, Inc. v. United States*, 404 F.2d 1187 (3d Cir. 1968); *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir. 1968); *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220 (D.C. Cir. 1967); *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert denied*, 375 U.S. 951 (1963).

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[20] In *Southwestern Cable* the Court explicitly disclaimed reaching any question concerning the validity of the FCC's cable rules. 392 U.S. at 167. In *Midwest I* the plurality opinion suggested in a footnote that the Eighth Circuit had correctly upheld the validity of several cable regulations. 406 U.S. at 659 n.17. However, the context of the reference makes clear that the plurality meant to suggest merely that the Eighth Circuit had correctly held that the particular rules at issue were within the standard set out in *Southwestern Cable* for testing the reach of the FCC's jurisdiction. In any event, as the *Midwest II* Court later acknowledged, the plurality's footnote in *Midwest I* was pure "dicta." 440 U.S. at 697 n.7. Indeed, the *Midwest II* Court, though not reaching any constitutional questions implicated by the particular regulations before it, described those questions as "not frivolous." 440 U.S. at 709 n.19.

These decisions took one of two paths to dispose of the cable operators' First Amendment contentions, often in a single brief paragraph. The most common approach was simply to treat cable and broadcast television as indistinguishable for purposes of First Amendment analysis. Because it was well established that broadcast media could be subject to regulation far more intrusive than the First Amendment would tolerate in other contexts, it naturally followed for these courts that cable regulation, a variant on the same theme, should be subject to no more exacting scrutiny. *See, e.g., Black Hills Video Corp. v. FCC, supra,* 399 F.2d at 69 ("[i]t is irrelevant * * * that [cable] systems do not themselves use the airwaves"). Other courts undertook a somewhat more discriminating analysis. They upheld the regulations only after concluding that the restraint on speech was no greater than was reasonably required to serve the important interest of preserving local broadcasting. *Buckeye Cablevision, Inc. v. FCC, supra,* 387 F.2d at 225.

In recent years the lower federal courts have subjected FCC regulation of cable television to a far more rigorous constitutional analysis. It is now clearly established, for example, that cable operators engage in conduct protected by the First Amendment. *See, e.g., Tele-Communications of Key West, Inc. v. United States,* 757 F.2d 1330, 1336 (D.C. Cir. 1985); *Preferred Communications, Inc. v. City of Los Angeles,* 754 F.2d 1396 (9th Cir. 1985); *Midwest Video Corp. v. FCC,* 571 F.2d 1025, 1052-1057 (8th Cir. 1978), *aff'd on other grounds,* 440 U.S. 689 (1979). Most of these courts, mindful of the Supreme Court's repeated admonitions to be sensitive to the unique features of each medium of expression, have cautioned against reflexive invocation of the more forgiving First Amendment standards applicable to broadcast regulations. *See, e.g., Preferred Communications, Inc. v. City of Los Angeles, supra,* 754 F.2d at 1403; *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 44-45 (D.C. Cir.) (*per*

curiam), *cert. denied*, 434 U.S. 829 (1977).[21] Indeed, in *Home Box Office* this court noted that earlier cases that had considered the intersection of the First Amendment and cable television regulations had incorrectly relied on Supreme Court precedent developed in the context of regulation of the broadcast media. Of particular note, the court "rejected" by name the reasoning of the Eighth Circuit in *Black Hills Video Corp. v. FCC*, *supra*, the only court to have explicitly considered the constitutionality of the must-carry rules. 567 F.2d at 45 n.80.

At issue in *Home Box Office* were a number of FCC regulations limiting the programming fare a cablecaster[22] could offer its subscribers. The Commission de-

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[21] *But see Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982).

[22] Cablecasting refers to origination of programming on a cable television system either by the operator itself or by entities that lease (or are given) channel space by a cable operator. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 17 n.2 (D.C. Cir.) (*per curiam*), *cert. denied*, 434 U.S. 829 (1977).

The Commission suggests that *Home Box Office* is inapposite because the decision was confined to issues relating to non-broadcast programming. The argument is unavailing. We note first that TBS describes both CNN and CNN Headline News as "non-broadcast" services. Brief for petitioner in No. 83-2050 at 3. In any event, the *Home Box Office* court expressly repudiated the reasoning of decisions that had upheld the constitutional validity of regulations prohibiting transmission of distant *broadcast* signals. 567 F.2d at 45 n.80. With respect to *Black Hills Video*, the case relied on by the Commission in this controversy, the court stated: "To the extent that *Black Hills Video* stands for the proposition that the Commission in some sense 'owns' the broadcast spectrum and can condition use of the signals accordingly, it must be rejected." *Id.* Moreover, although the decision did suggest that the rationale justifying lesser First Amendment scrutiny for broadcast regulation (the "scarcity rationale") might retain some force in the context of granting a microwave *license* to a cable operator, it expressly did not suggest that the FCC's power over microwave radio links implied a constitutionally

fended the rules by suggesting that they were necessary to assure that the various forms of pay television, including cable, not degrade the quality of programming on conventional broadcast television. As in the present controversy, the Commission suggested that the competitive injury to broadcasters would be felt most acutely by those who could not afford the more expensive video services.

The court rejected the FCC's argument and sustained the First Amendment challenge. Concluding that the regulation should be treated as an incidental burden on speech, the court applied the test announced by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Thus the regulations would be valid only if they served a substantial governmental interest and were no more intrusive than necessary to serve that interest. 567 F.2d at 48.

Measured against this standard, the court found the regulations wanting. They failed the first component of the test because the FCC had "not put itself in a position to know" whether its fears about the effect of cable television on local broadcasting were "real or merely * * * fanciful." *Id.* at 50. The regulations failed to clear the second *O'Brien* hurdle because they were "grossly overbroad," indiscriminately limiting the programming of cable systems whether or not the limits in fact served to protect the interests the rules purported to serve. *Id.* at 51.

In sum, the Supreme Court has never addressed the constitutional validity of the must-carry rules or of any of the analogous FCC regulations affecting cable television. To the extent the Court has considered the issue

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permissible authority over cable generally. Indeed, in its general discussion of the inapplicability of the scarcity rationale to cable the court drew no distinction among the various sources of signals ultimately transmitted to the subscriber. 567 F.2d at 44-45.

at all, it has described the question as "not frivolous." *Midwest II*, 440 U.S. at 709 n.19. In the lower federal courts the initial trend was to sustain the regulations against First Amendment and due process challenges. In recent years, however, the courts have subjected governmental regulation of cable to far more exacting constitutional scrutiny. The 1977 decision in *Home Box Office* suggested that FCC regulation of cable could withstand analysis under the First Amendment only if the Commission proved that the regulation burdened speech only incidentally, served an important governmental interest, and was no broader than necessary to further that interest.

C. *The TBS and Quincy Petitions*

1. *TBS.* In 1980 TBS petitioned the FCC to institute rulemaking to consider deleting the must-carry rules. *Petition For Rulemaking To Delete The Cable "Must Carry" Rules*, October 15, 1980, *Turner* JA at 5-17. In support of its petition TBS argued that the regulatory environment had changed substantially since the original promulgation of the rules and that the factual premises and economic assumptions on which the rules were premised had long since been disproved or abandoned. *Id.* at 6-11. In addition, it suggested that the must carry-rules could not survive the constitutional test set out in *Home Box Office*. *Id.* at 11-16.

TBS's economic grievance was straightforward. As a cable *programmer*, TBS is in the business of selling a package of programming to the independent cable *operators*, who actually deliver the cable signal in the communities they are franchised to serve.[23] If, because of the must-carry rules, a significant number of a cable operator's channels are occupied by the signals of local

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[23] *See* notes 1 & 7 *supra*. For both CNN and CNN Headline News the cable operator pays a small charge per subscriber. SATELLITE SERVICES REPORT, *supra* note 3.

broadcasters, programmers will face artificially stiff competition for the limited number of channels that remain available for non-mandatory transmissions. If the cable system is "saturated" with must-carry signals, a phenomenon recognized by the Commission, the rules operate to deprive programmers of any opportunity at all to sell their services.[24]

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[24] In light of this injury, TBS clearly has standing to raise this claim. In numerous petitions for waiver from the force of the must-carry rules, cable operators have expressly indicated that application of the rules would preclude carriage of TBS programming. *See, e.g.*, letter petition for waiver of Quincy Cable Co., *Quincy* JA at 37-40; supplemental brief for petitioner in No. 83-1283 at 6 (indicating that application of must-carry rules would prevent carriage of CNN altogether or force the operator to relegate CNN to another, more expensive tier of channels accessible to substantially fewer subscribers). Denial of those waiver petitions, *see, e.g., In re Quincy Cable TV, Inc.*, 89 FCC2d 1128 (1982), *Quincy* JA at 12, necessarily results in significant injury to TBS, injury that is easily sufficient to constitute "injury in fact." The injury is especially acute in the case of systems "saturated" with must-carry signals. *See* brief for respondents in No. 83-2050 at 38 n.27 (acknowledging existence of saturated systems). *See also Saturated System Rulemaking*, 66 FCC2d at 710-714. In those circumstances, the operator could not possibly purchase any TBS programming.

While, of course, it cannot be said with absolute certainty that invalidation of the must-carry rules would redress this economic injury—a cable operator might still elect not to purchase any TBS programming—certainty is not a constitutional prerequisite. *See Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982) (injury must be *"fairly"* traceable to the challenged action and *"likely* to be redressed by a favorable decision") (emphasis added); *Autolog Corp. v. Regan*, 731 F.2d 25, 31 (D.C. Cir. 1984). Where, as here, TBS can point to assertions by cable operators that, but for the must-carry rules, they would carry its programming, we have no doubt that the likelihood that the injury would be redressed by a favorable decision is sufficiently high to confer standing. In any case, the Supreme Court has recognized that a plaintiff

The TBS petition fell into something of a black hole. Although extensive comments were filed by interested members of the broadcast and cable industry, the FCC took no action. On March 21, 1983 TBS filed a *Petition for Expedited Consideration*, *Turner* JA at 43, again contending that the First Amendment as well as general principles of administrative law required reevaluation of the rules. When that petition too elicited no response, TBS sought review in this court, requesting that we compel the Commission to institute rulemaking or, at least, respond to its petition. Just before its brief was due the Commission moved the court to remand the record so that it could act on the TBS petition. On March 23, 1984 that motion was granted.

Two weeks later the Commission issued a three-page memorandum order in which it formally denied the petition for rulemaking. *Opinion and Order*, *Turner* JA at 1-4. Its First Amendment analysis was limited to a single, unadorned citation to the Eighth Circuit's decision in *Black Hills Video Corp. v. FCC*, *supra*. The Commission acknowledged that the rules were "intended to compel carriage of broadcast signals in place of alternate programming that subscribers, if given their choice, might otherwise choose" and that the rules place cable programmers "on an unequal footing" because they "take[] cable channels out of the marketplace where nonbroadcast program originators might otherwise have been able to negotiate for their use." *Turner* JA at 3. Nonetheless, it concluded that TBS had failed to demonstrate that the countervailing interest of protecting local television had ceased to justify continuation of the rules. Believing that rulemaking would be premature until "a more complete factual base," *id.*, were developed, the Commission denied TBS's petition.

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who has been entirely deprived of any opportunity to compete has standing to challenge the constitutionality of that deprivation. *Regents of University of California v. Bakke*, 438 U.S. 265, 280-281 n.14 (1978) (plurality opinion).

TBS now petitions for review of that denial, requesting, in the alternative, that we set aside the rule as unconstitutional or compel the Commission to institute rulemaking to reconsider the rules.

2. *Quincy.* Quincy operates a cable television system in Quincy, Washington, a small town approximately 125 miles equidistant from Seattle and Spokane. At the origin of this proceeding Quincy had a 12-channel capacity, and all 12 channels were in use. Exercising its editorial and commercial discretion, Quincy had elected to provide its subscribers with a channel that originated on the cable system itself, the signals of the three network affiliates in Seattle, the largely duplicative signals of the three network affiliates in Spokane, a Spokane-based public broadcasting station, and four other channels offering a wide variety of public affairs and entertainment programming. Of the 12 channels, only the four Spokane stations could be received without the benefit of cable.[25]

In 1979, after conducting a survey, Quincy came to believe that its subscribers would prefer to view three specialized cable programmers, including a 24-hour news service, instead of the three commercial Spokane stations. Although the three Spokane stations had not yet formally requested carriage (thus triggering Quincy's "must-carry" obligation), Quincy recognized that such a request would almost certainly follow the announcement of its intention to delete the three signals from its system. Accordingly, Quincy wrote the Commission and, in effect, petitioned for a partial waiver from the force of the rules. Letter from Quincy Cable TV, Inc. to Wil-

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[25] Because the Spokane signals originated over 125 miles away, viewers in Quincy could receive them in intelligible form only with the help of a UHF translator. A translator amplifies and rebroadcasts off-air signals and is common in areas in which direct reception is hindered by distance or intervening terrain barriers.

lard Nichols, Chief of FCC Cable Television Bureau, November 19, 1979, *Quincy* JA at 37.

In April 1980 the Cable Television Bureau of the FCC denied Quincy's waiver request. Letter from Willard Nichols, Chief of Cable Television Bureau, to Quincy Cable TV, Inc., April 28, 1980, *Quincy* JA at 1. Technically not under the compulsion of the must-carry rules until the Spokane stations requested carriage,[26] Quincy deleted two of the stations from its system. It then began a long series of administrative appeals of the waiver denial. At every stage Quincy advanced, and the Bureau rejected, the argument that the must-carry rules violated the First Amendment to the Constitution.[27] When Quincy continued to refuse carriage of the Spokane stations even after two of them formally requested carriage, the full Commission upheld the denial of the waiver and imposed a $5,000 "forfeiture." *Quincy Cable TV, Inc.*, 89 FCC2d 1128 (1982). Although Quincy did at that point reinstate the two Spokane stations, it continued to press its claim before the Commission. When the full Commission again upheld the imposition of the forfeiture, Quincy petitioned this court for review.

On the eve of oral argument the court learned of factual developments occurring during the pendency of

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[26] Although two of the stations requested carriage in the course of opposing the waiver, Quincy's must-carry obligations did not ripen until the expiration of the stay automatically granted during the pendency of a waiver petition. *See* 47 C.F.R. § 76.7(g). We do not address Quincy's contention that the Commission's construction of the automatic stay provision was erroneous.

[27] Quincy also contended that mandatory carriage of a broadcast signal constitutes a compensable taking under the Fifth Amendment. In light of Quincy's failure to allege damages, we read its takings argument to be an alternative ground for invalidating the rules. Because we find the rules infirm under the First Amendment, we need not and do not address Quincy's Fifth Amendment contentions.

the petition and remanded the case to the FCC for reconsideration in light of the changed circumstances.[28] *Quincy Cable TV, Inc. v. FCC*, 730 F.2d 1549 (D.C. Cir. 1984). On remand, the Commission ordered Quincy to supplement its filings. Believing that Quincy's supplementary submission served only to validate its earlier position, the Commission reaffirmed its decision to deny the requested waiver and impose a $5,000 forfeiture for failure to comply with the must-carry rules. This petition ensued.

II. The First Amendment: Standard of Review

The task of determining the appropriate standard of First Amendment review to apply to the must-carry rules requires us to address two distinct questions.[29] We begin

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[28] During the course of the lengthy proceedings before the Commission, Quincy had expanded its channel capacity. Although now willing to carry the Spokane signals, it objected to the requirement that it carry them on its "basic tier" of 12 channels, the only service taken by most of its subscribers. Although the record is not entirely clear, it appears that the Commission imposed the $5,000 fine while Quincy had a 12-channel capacity. Moreover, we note that the interference with Quincy's editorial autonomy, a value protected by the First Amendment, does not disappear with an increase in channel capacity. *See* note 41 *infra*.

[29] The parties do not contest our authority to consider the constitutionality of the rules in the context of reviewing the denial of Turner's petition for rulemaking. Nonetheless, because our jurisdiction is implicated, we briefly address the point. A petition for rulemaking cannot create jurisdiction in this court to adjudicate the legality of rules that would otherwise be unreviewable. However, because Turner had demonstrated ongoing injury from the enforcement of these regulations sufficient to confer standing, *see* note 24 *supra*, the constitutionality of the must-carry rules is properly before us, albeit in this unusual posture. Since the rules will never be enforced *directly* against Turner—but only against cable operators to whom Turner wishes to sell programming—this is the only opportunity Turner would have to raise these claims.

by evaluating whether First Amendment principles governing regulation of the broadcast media should also apply to regulation of cable television. Concluding that cable television warrants a standard of review distinct from that applied to broadcasters, we next consider whether the must-carry rules merit treatment as an "incidental" burden on speech and therefore warrant analysis under the balancing test set out in *United States v. O'Brien, supra*, 367 U.S. at 199. Although our review leaves us with serious doubts about the appropriateness of invoking *O'Brien*'s interest-balancing formulation, we conclude that the rules so clearly fail under that standard that we need not resolve whether they warrant a more exacting level of First Amendment scrutiny.

A. *The Scarcity Rationale*

It has become something of a truism to observe that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S. at 386. *See also FCC v. Pacifica Foundation*, 438 U.S. 726, 748 (1978); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952); *Tele-Communications of Key West, Inc. v. United States, supra*, 757 F.2d at 1338-1339. The suggestion is not that traditional First Amendment doctrine falls by the wayside when evaluating the protection due novel modes of communication. For the core values of the First Amendment clearly transcend the particular details of the various vehicles through which messages are conveyed. Rather, the objective is to recognize that those values are best served by paying close attention to the distinctive features that differentiate the increasingly diverse mechanisms through which a speaker may express his view.

This sensitivity to the uniqueness of each medium precludes facile adoption of the First Amendment jurisprudence that has developed around challenges to FCC regu-

lation of broadcast television and radio. From the perspective of the viewer, no doubt, cable and broadcast television appear virtually indistinguishable. For purposes of First Amendment analysis, however, they differ in at least one critical respect. Unlike ordinary broadcast television, which transmits the video image over airwaves capable of bearing only a limited number of signals, cable reaches the home over a coaxial cable with the technological capacity to carry 200 or more channels.[30]

The distinction is of fundamental significance in light of the Supreme Court's oft-repeated suggestion that the First Amendment tolerates far more intrusive regulation of broadcasters than of other media precisely because of the inescapable physical limitations on the number of voices that can simultaneously be carried over the electromagnetic spectrum. *See, e.g., FCC v. League of Women Voters of California, supra,* 104 S.Ct. at 3116; *see also Preferred Communications, Inc. v. City of Los Angeles, supra,* 754 F.2d at 1403.[31] These limitations, the Su-

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[30] *See* note 8 *supra.*

[31] In one instance the Supreme Court did appear to look beyond spectrum scarcity to determine the appropriate standard against which to evaluate the constitutionality of a broadcast regulation. *FCC v. Pacifica Foundation,* 438 U.S. 726 (1978) (upholding FCC's power to regulate "indecent" speech broadcast over radio). *Pacifica's* holding, however, is extremely "narrow[]," *id.* at 750, and its reasoning has subsequently been limited to the particular circumstances of the case. *See Bolger v. Youngs Drug Products Corp.,* 463 U.S. 60, 74 (1983). In addition, we note that several courts have held that *Pacifica's* rationale is inapposite in the context of cable television regulation. *See, e.g., Cruz v. Ferre,* 755 F.2d 1415, 1420-1421 (11th Cir. 1985) (focusing on cable subscriber's affirmative monthly decision to bring cable or a particular cable channel into his or her home and on the availability of a "lock box" to regulate viewing habits of children); *Community Television of Utah, Inc. v. Roy City,* 555 F.Supp. 1164 (D. Utah 1982).

preme Court observed early on, engender a peculiar irony of the broadcast medium: limited regulation, by converting aural and visual chaos into channels of effective communication, furthers rather than impedes the First Amendment's mission. "With everybody on the air," wrote Justice Frankfurter, "nobody could be heard. * * * [T]he radio spectrum is simply not large enough to accommodate everybody." *National Broadcasting Co. v. United States*, 319 U.S. 190, 212-213 (1943). Without the imposition of some governmental control, "the cacophony of competing voices" would drown each other out. *Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S. at 376. Moreover, quite independent of the objective of bringing communicative order to the otherwise chaotic airwaves, the First Amendment tolerates a modest degree of government oversight of broadcast radio and television because such regulation assures that broadcasters, privileged occupants of a physically scarce resource, act in a manner consistent with their status as fiduciaries of the public's interest in responsible use of the spectrum. *Id.* at 389.

As this and other courts have recognized, the "scarcity rationale" has no place in evaluating government regulation of cable television.[32]

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[32] This court has also observed that technological advances may have rendered the "scarcity rationale" obsolete even for broadcasters. *Loveday v. FCC*, 707 F.2d 1443, 1458-1459 (D.C. Cir. 1983). Numerous scholars have taken the same position. *See, e.g.*, Fowler and Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 221-226 (1982). The Supreme Court recently suggested, however, that it was not prepared to reconsider its "long-standing approach" to the broadcast medium. *FCC v. League of Women Voters of California*, 104 S.Ct. 3106, 3116 n.11 (1984). Although the Court in *League of Women Voters* applied to a broadcast regulation a standard of review similar to that sometimes applied to rules affecting other media, it made clear that the particular law at issue would receive far more exacting scrutiny if it were directed at non-broadcast speech.

> The First Amendment theory espoused in *National Broadcasting Co.* and reaffirmed in *Red Lion Broadcasting Co.* cannot be directly applied to cable television since an essential precondition of that theory —physical interference and scarcity requiring an umpiring role for government—is absent. * * *

Home Box Office, Inc. v. FCC, supra, 567 F.2d at 45. *See also Preferred Communications, Inc. v. City of Los Angeles, supra,* 754 F.2d at 1404; *Omega Satellite Products Co. v. City of Indianapolis,* 694 F.2d 119, 127 (7th Cir. 1982); Note, *Cable Television and the First Amendment,* 71 COLUM. L. REV. 1008 (1971).

Nor do we discern other attributes of cable television that would justify a standard of review analogous to the more forgiving First Amendment analysis traditionally applied to the broadcast media. We cannot agree, for example, that the mere fact that cable operators require use of a public right of way—typically utility poles —somehow justifies lesser First Amendment scrutiny. *See Omega Satellite Products Co. v. City of Indianapolis, supra,* 694 F.2d at 127. The potential for disruption inherent in stringing coaxial cables above city streets may well warrant some governmental regulation of the process of installing and maintaining the cable system. But hardly does it follow that such regulation could extend to controlling the nature of the programming that is conveyed over that system. No doubt a municipality has some power to control the placement of newspaper vending machines. But any effort to use that power as the basis for dictating what must be placed in such machines would surely be invalid.[33]

Nor, on this record, can we concur in the suggestion that the "natural monopoly characteristics" of cable create economic constraints on competition comparable to the physical constraints imposed by the limited size of the

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[33] *See* CABLESPEECH, *supra* note 17, at 107.

electromagnetic spectrum. *Omega Satellite Products Co. v. City of Indianapolis, supra,* 694 F.2d at 127; *see also Berkshire Cablevision of Rhode Island, Inc. v. Burke,* 571 F.Supp. 976, 985-988 (D. R.I. 1983). At the outset, the "economic scarcity" argument rests on the entirely unproven—and indeed doubtful—assumption that cable operators are in a position to exact monopolistic charges. *See* G. SHAPIRO, P. KURLAND & J. MERCURIO, CABLESPEECH: THE CASE FOR FIRST AMENDMENT PROTECTION 9-11 (1983). Moreover, the tendency toward monopoly, if present at all, may well be attributable more to governmental action—particularly the municipal franchising process—than to any "natural" economic phenomenon. *See* R. POSNER, CABLE TELEVISION: THE PROBLEM OF LOCAL MONOPOLY 4 (Ford Foundation Memorandum RM-6309-FF 1970). In any case, whatever the outcome of the debate over the monopolistic characteristics of cable, the Supreme Court has categorically rejected the suggestion that purely economic constraints on the number of voices available in a given community justify otherwise unwarranted intrusions into First Amendment rights. *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 247-256 (1974). While *Miami Herald* involved the conventional press, as this court has had prior occasion to observe, there is no meaningful "distinction between cable television and newspapers on this point." *Home Box Office, Inc. v. FCC, supra,* 567 F.2d at 46.

Indeed, once one has cleared the conceptual hurdle of recognizing that all forms of television need not be treated as a generic unity for purposes of the First Amendment, the analogy to more traditional media is compelling. Two influential commissions have in fact reached precisely that conclusion. In the words of the Cabinet Committee on Cable Communications, "[C]able development has the potential of creating an electronic medium of communications more diverse, more pluralistic and more open, more like the print and film media than like our present broadcast system." CABINET COMMITTEE

ON CABLE COMMUNICATIONS, CABLE: REPORT TO THE PRESIDENT, Ch. I, p. 14 (1974). *See also* SLOAN COMMISSION ON CABLE COMMUNICATIONS, ON THE CABLE 92 (1971) ("Cable television, by freeing television from the limitations of radiated electro-magnetic waves, creates * * * a situation more nearly analogous to that of the [print] press.").[34]

In sum, beyond the obvious parallel that both cable and broadcast television impinge on the senses via a video receiver, the two media differ in constitutionally significant ways. In light of cable's virtually unlimited channel capacity, the standard of First Amendment review reserved for occupants of the physically scarce airwaves is plainly inapplicable. Accordingly, we must look elsewhere to determine the appropriate yardstick against which to measure the constitutionality of the must-carry rules.

B. *The Appropriateness of Treating The Must-Carry Rules as an Incidental Burden on Speech*

That cable television shares attributes of the more traditional press does not, of course, suggest that the First Amendment interposes an impermeable bulwark against any regulation. As the *Home Box Office* court observed, for cable, no less than for other media, the First Amendment draws a distinction between "incidental" burdens on speech—regulations that evince a governmental interest unrelated to the suppression or protection of a particular set of ideas—and restrictions that are "intended to curtail expression—either directly by banning speech because of * * * its communicative or persuasive effect on its intended audience * * * or indirectly by favoring certain classes of speakers over others * * *." 567 F.2d at 47-48.

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[34] *See also* B. SCHMIDT, FREEDOM OF THE PRESS VS. PUBLIC ACCESS 200 (1975); *Electronic Newspaper, supra* note 7, 51 N.Y.U. L. REV. at 146.

If the regulation falls in the former category, it will be sustained if "it furthers an important or substantial governmental interest * * * and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien, supra,* 391 U.S. at 377. *See also Members of City Council of Los Angeles v. Taxpayers for Vincent,* 104 S.Ct. 2118, 2129 (1984); *Procunier v. Martinez,* 416 U.S. 396, 411 (1974); *National Black United Fund, Inc. v. Devine,* 667 F.2d 173, 179 (D.C. Cir. 1981). If, however, the regulation cannot fairly be understood as a merely incidental restriction on expression, the regulation will be upheld, if at all, only if the government adequately carries a significantly heavier burden of justification.[35] Indeed, some governmental objectives—"such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—* * * are so plainly illegitimate" that they are forbidden altogether. *Members of City Council of*

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[35] Although in some contexts the government carries an extraordinarily "heavy burden of showing justification," *New York Times Co. v. United States,* 403 U.S. 713, 714 (1971) (*per curiam*), the decisions at least contemplate (although they rarely in fact find) the existence of an interest that is so compelling that the regulation will be reluctantly upheld. *See, e.g., Consolidated Edison Co. v. Public Service Comm'n,* 447 U.S. 530, 535, 540 (1980); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 786 (1978). *See also* B. SCHMIDT, *supra* note 34, at 232-233. Some justifications, however, are patently illegitimate and simply will not be weighed in the balance. *Members of City Council of Los Angeles v. Taxpayers for Vincent,* 104 S.Ct. 2118, 2128 (1984). Where the object of the regulation is related to suppression or protection of a particular viewpoint, it is invalid unless it falls within one of a small number of strictly circumscribed categories. *See* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis,* 88 HARV. L. REV. 1482 (1975).

Los Angeles v. Taxpayers for Vincent, *supra*, 104 S.Ct. at 2128.

Thus the threshold question before us, as before the court in *Home Box Office*, is whether the intrusion worked by the challenged regulations merits treatment as an "incidental" burden on speech. In *Home Box Office* the court found that the FCC cable rules there at issue were best understood as embodying an interest unrelated to speech and therefore qualified for the analytic track set out in *O'Brien* and its progeny. That conclusion, as we now show, is far less certain in the context of the present challenge.

In one sense, of course, as is invariably the case,[36] the government can frame the interest served by the must-carry rules in essentially speech-neutral terms. So framed, the rules' object is to assure that the rise of a potentially monolithic national television industry not undermine the economic vitality of free, locally-controlled broadcasting.

Yet even so understood, the Commission's objective is a far cry from the sort of interests that typically have been viewed as imposing a merely "incidental" burden on speech. Although not intended to suppress or protect any particular viewpoint, the rules are explicitly designed to "favor[] certain classes of speakers over others." *Home Box Office, Inc. v. FCC*, *supra*, 567 F.2d at 48. Their very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming competitive advantage over cable programmers. *Opinion and Order*, *Turner* J.A. at 3. Under the protective aegis of the rules, local broadcasters are guaranteed the right to convey their messages over the cable system while cable programmers must vie for a proportionately diminished number of channels. In the case of systems saturated

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[36] *See* Ely, *supra* note 35, 88 HARV. L. REV. at 1496-1497.

with mandatory signals, cable programmers are shut out entirely from the only forum capable of conveying their programming. Because "the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment," *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), the conclusion that the must-carry rules burden First Amendment rights only incidentally is far from inevitable.[37]

Viewed from the perspective of the cable operator, the entity that delivers a preselected package of channels to paying subscribers, the must-carry rules are equally intrusive. The rules coerce speech; they require the operator to carry the signals of local broadcasters regardless of their content and irrespective of whether the operator considers them appropriate programming for the community it serves. The difficulty is not so much that the rules force operators to act as a mouthpiece for ideological perspectives they do not share, *see Wooley v. Maynard*, 430 U.S. 705, 714 (1977), although such a result is by no means implausible.[38] The more certain injury stems from the substantial limitations the rules work on the operator's otherwise broad discretion to select the programming it offers its subscribers. *See Miami Herald Co. v. Tornillo*, *supra*, 418 U.S. 241 (recognizing First Amendment protection of editorial discretion).

Although in cable's infancy cable operators served exclusively as passive conduits of broadcast signals, their

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[37] In the context of the print media, for example, it seems highly unlikely that a law requiring vendors of newspapers to carry local publications would be treated as an incidental burden on speech even though in some sense the purpose of the rule was viewpoint-neutral.

[38] One operator recently objected to the carriage of the religious programming of a local broadcaster. *See In re Group W Cable, Inc.*, *supra* note 13, 57 Rad. Reg. (P&F) at 638. The Commission denied the requested waiver.

editorial role has expanded dramatically over the course of the industry's brief history. *See generally* H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 20-22 (1983). No longer mere "funnel[s] for other broadcasting," Note, *The Wire Mire: The FCC and CATV*, 79 HARV. L. REV. 366, 367 (1965), operators now select from "a rich variety" of additional options, including locally originated cablecasts, and the programming of over 40 independent cable networks, which offer such diverse fare as movies, sports, news, live coverage of public events, and specialized presentations aimed at individual segments of the national audience. *In re Community Cable TV, Inc.*, 54 Rad. Reg. 2d (P&F) 1351, 1359 (1983). *See generally* H.R. Rep. No. 98-934, *supra*, at 21.[39]

Indeed, in the context of reviewing the FCC's power to promulgate regulations mandating public access to cable channels, the Supreme Court explicitly acknowledged the breadth of the editorial judgment exercised by cable operators. *Midwest II*, 440 U.S. at 707-708 n.17. No less than the access regulations at issue in *Midwest II*, the must-carry rules "significantly compromise" the cable operator's editorial discretion: "Even when not occasioning the displacement of alternative programming, compelling cable operators indiscriminately to accept * * * programming will interfere with their determinations regarding the total service offering to be extended to subscribers." *Id.* Moreover, unlike access rules, which serve countervailing First Amendment values by pro-

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[39] As late as the mid-1970's it was not uncommon to suggest that the cable operator exercised no editorial discretion. *See, e.g.*, B. SCHMIDT, *supra* note 34, at 213. In today's video marketplace, especially in light of the advent of the cable programming industry, that suggestion is clearly anachronistic.

We need not decide whether the cable operator's editorial discretion is of the same order as that of a broadcaster or a newspaper. *See Midwest II*, 440 U.S. at 707-708 n.17. We have no doubt, however, that it is of sufficient magnitude to implicate the First Amendment.

viding a forum for public or governmental authorities, the must-carry rules transfer control to local broadcasters who already have a delivery mechanism granted by the government without cost and capable of bypassing the cable system altogether.

That the intrusion into cable operators' editorial autonomy is deep does not, of course, require the conclusion that the rules are inappropriate for analysis under the *O'Brien* test. *Cf. Procunier v. Martinez*, *supra*, 416 U.S. 396. Nonetheless, the Supreme Court's prior treatment of other laws and regulations that impinged on the editorial function engenders at least some doubt about the appropriateness of shunting the must-carry rules onto the analytical track reserved for other incidental burdens on expression. Even for broadcasters, regulations that transfer control over programming content to others have met with approval only grudgingly and then only in highly specialized circumstances and without reference to the *O'Brien* balancing formulation. *See CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981). More significantly, as the Court made clear in *Miami Herald Publishing Co. v. Tornillo*, *supra*, once outside the special constitutional realm reserved for privileged occupants of the physically scarce airwaves, the First Amendment guards against governmental intrusions into the editorial function even more jealously. *Compare Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. 367.

Indeed, if *Miami Herald* supplies the appropriate mode of First Amendment analysis, our inquiry would be at an end without any need for testing the rules against the other *O'Brien* factors or applying any other form of interest-balancing.[40] In *Miami Herald* the Court faced a constitutional challenge to a Florida statute that re-

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[40] *But see* B. SCHMIDT, *supra* note 34, at 233-235 (describing absence of balancing in *Miami Herald* as aberrational and suggesting that such an approach would not invariably be followed).

quired newspapers to grant a right to reply to political candidates attacked in earlier editions. Without so much as alluding to even the possibility of a subordinating governmental interest, the Court invalidated the statute. Forcing an editor to print that which he otherwise would not, the Court held, was a restraint the First Amendment simply would not tolerate. The result would be no different, the Court took pains to note, even if it could be shown that complying with the statute would cause the newspaper to suffer no additional costs. 418 U.S. at 258.[41]

In short, our examination of the purposes that underlie the must-carry rules, the nature and degree of the intrusions they effect, and prior judicial treatment of analogous regulations leaves us with serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech. Although the goal of the rules—preserving local broadcasting—can be viewed as unrelated to the suppression or protection of any particular set of ideas, the rules nonetheless profoundly affect values that lie near the heart of the First Amendment. They favor one group of speakers over another. They severely impinge on editorial discretion. And, most importantly, if a system's channel capacity is substantially or completely occupied by mandatory signals, the rules prevent cable programmers from reaching their intended audience even if that result directly contravenes the preference of cable subscribers. Indeed, as a matter of established regulatory policy, the Commission considers the desires of cable subscribers to be irrelevant to the application of the rules. *See, e.g., In Re Group W Cable, Inc.*, 57 Rad. Reg. 2d (P&F) 637, 639 (1984). This conscious disregard of subscribers' viewing preferences is difficult, if not impossible, to reconcile

[41] Applying this reasoning to Quincy suggests that it makes little difference to the analysis whether the cable system has two channels or 200.

with the Supreme Court's repeated admonition that the interests of viewers should be considered "paramount" in the First Amendment calculus. *Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. at 390. While, of course, viewers of broadcast television also have significant First Amendment interests, we doubt very much that cable subscribers "can[] be left out of the equation" entirely. *Community Communications Co. v. City of Boulder*, 660 F.2d 1370, 1376 n.5 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982).

We need not, however, definitively decide whether a more exacting standard than that announced in *O'Brien* and applied in *Home Box Office* is the correct test for evaluating the constitutionality of the must-carry rules. For even if we assume that the regulations burden speech only incidentally and therefore can pass muster under the First Amendment if they "further[] an important or substantial governmental interest" and impose a restriction "no greater than is essential to the furtherance of that interest," *Home Box Office, Inc. v. FCC*, *supra*, 567 F.2d at 48, we have concluded that the must-carry regulations, as written, are clearly impermissible.

III. The Standard Applied

A. *The Substantiality of the Governmental Interest*

The Commission contends that the must-carry rules serve the interest of preserving free, locally-oriented television.[42] The difficult question whether, taken as an

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[42] The Commission and several intervenors obliquely suggest that, in addition to preserving localism, the rules are an integral part of the federal copyright scheme and, as such, serve another important interest. *See* 17 U.S.C. § 101 *et seq.* (1982). Under the Copyright Revision Act of 1976, cable operators are granted a compulsory license to retransmit broadcast signals in return for payment of a copyright royalty fee. *Id.* § 111(c)-(d). The obligation to pay royalties arises only from carriage of distant (non-network) signals, defined as

abstract proposition, that interest is sufficiently weighty to warrant the rules' interference with First Amendment rights must await resolution in another case. For even if we accept the common wisdom that the goal of encouraging "localism" qualifies as "important or substantial," *United States v. O'Brien, supra*, 391 U.S. at 377,[43] we would be unable to find that the FCC has carried its heavy burden of justification.

In many circumstances the mere abstract assertion of a substantial governmental interest, standing alone, is insufficient to justify the subordination of First Amendment freedoms. Two such circumstances are relevant to

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those extending "beyond the local service area of the primary transmitter." *Id.* The legislative history makes clear that the "local service area" corresponds to the area in which the station is entitled to mandatory carriage. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 99 (1976).

Neither the Commission nor the intervenors direct our attention to any suggestion in the Act or elsewhere that the must-carry rules serve as anything more than a convenient reference point for determining where a local signal ends and a distant signal begins. By invalidating the must-carry rules on First Amendment grounds, we do not, of course, suggest that they may not continue to serve that function.

[43] As recently as last year, this court recognized "the importance of local broadcasting to a national broadcasting system." *National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984). *See also Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694, 2708 (1984). That view is clearly shared by Congress. Although the Commission's pursuit of "localism" is not embodied in an explicit statutory command, *Inquiry Into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, 90 FCC2d 676, 686 (1982) (*DBS Inquiry*), Congress has expressed its commitment to "a widely dispersed radio and television service" and has noted that the elimination of local service is a "matter of real and immediate public concern." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 173 & n.38 (1968), *quoting* S. Rep. No. 923, 86th Cong., 1st Sess. at 7 (1959).

this petition. First, if, as petitioners allege, the Commission has generally concluded that cable poses no threat to broadcasting, this change in perspective clearly would undermine its suggestion that "localism" is sufficiently important or substantial to warrant the significant abridgment of protected activity effected by the must-carry rules. Second, as this court stressed in *Home Box Office*, in the administrative context *O'Brien's* substantial interest requirement "translates * * * into a record that convincingly shows a problem to exist." 567 F.2d at 50.[44] At least in those instances in which both the existence of the problem and the beneficial effects of the agency's response to that problem are concededly susceptible of some empirical demonstration, the agency must do something more than merely posit the existence of the disease sought to be cured. In the context of this case the question becomes whether the Commission has adequately proven that without the protection afforded by the must-carry rules the economic health of local broadcast television is threatened by cable.

We address each issue in turn.

1.

In a burst of deregulatory activity unparalleled in its history, the FCC has recently dismantled large portions of the extensive regulatory structure under which both broadcast and cable television have labored for many

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[44] Even in the context of reviewing legislative acts, the Supreme Court has frequently required more than an unsubstantiated assertion of the importance of the governmental interest. *See Members of City Council of Los Angeles v. Taxpayers for Vincent, supra* note 35, 104 S.Ct. at 2128 n.22 (Court "may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity"); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 72-73 (1981) (rejecting government's claim in part because no evidence offered to support argument that zoning ordinance serves asserted interest).

decades. *See, e.g., Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 49 Fed. Reg. 33588 (1984) (to be codified at 47 C.F.R. § 73) (*Revision of Programming*). Details aside, the thrust of this movement has been the Commission's belief that the public interest in diverse video options is best served by deferring to the marketplace. *Id.; Economic Inquiry Report*, 71 FCC2d at 697. As part of this comprehensive endeavor, the Commission has eliminated numerous regulations which, like the must-carry rules, were premised on the desire to protect local broadcasters from competition from the expanding cable industry. *See, e.g., Syndicated Exclusivity Rules*, 79 FCC2d 663 (deleting distant-signal and syndicated-exclusivity rules). In addition, it has authorized a wide array of new multichannel video competitors to over-the-air broadcast television and exempted them from any obligation to carry local programming. *See, e.g., Inquiry Into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, 90 FCC2d 676, 691-692 (1982) (*DBS Inquiry*).

Petitioner TBS contends that in the course of this deregulation the Commission has disclaimed the very premises on which the must-carry rules are founded.[45] If, in

[45] TBS also contends that the FCC's deregulatory efforts imply a complete abandonment of its concern for localism. That contention, we have concluded, is incorrect. It simply does not follow that deregulation, even massive deregulation, implies a wholesale abandonment of the goal of preserving local broadcast television. Although the Commission of late has pursued different means to that end—preferring to rely on the free market rather than active administrative oversight—it has never wavered from its view that preservation of local television is a cornerstone of its regulatory policy. In deleting the distant-signal rules, for example, the Commission observed that it was doing so only on the basis of its conclusion that elimination of the rules "creat[ed] no risks of serious harm to the welfare of off-the-air television view-

fact, the FCC has repudiated the economic assumptions that underlie the must-carry rules, the suggestion that they serve an important governmental interest (or any interest at all) would be wholly unconvincing. As the *Home Box Office* court stated, "[A] 'regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'" 567 F.2d at 36 (*quoting City of Chicago v. FPC*, 458 F.2d 731, 742 (D.C. Cir. 1971)). Similarly, an asserted interest in alleviating or forestalling a problem—such as the destruction of free, local television—can hardly be considered "important or substantial" if the government now denies that the alleged problem is a problem at all.

TBS places particular reliance on the conclusions of the *Economic Inquiry Report*, the Commission's comprehensive analysis that culminated in deletion of several of the must-carry rules' regulatory siblings. "Upon examination of the economic evidence," the Commission stated, "we conclude that competition from cable television does not pose a significant threat to conventional television or to our overall broadcasting policies. * * * [C]able does not appear to be a major negative force on the financial situation of television broadcasters * * *." 71 FCC2d at 661, 688. These conclusions, if given the broad applicability their sweeping tone suggests, would fatally undercut the Commission's argument that the must-carry rules serve the important end of preventing the destruction of free, local broadcasting.

The Commission parries this potentially mortal thrust by contending that the *Economic Inquiry Report* focused

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ers." *Syndicated Exclusivity Rules*, 79 FCC2d at 825 (Appendix). *See also Notice of Inquiry*, 65 FCC2d at 10. Thus, standing alone, the fact of substantial deregulation of cable television does not undermine the Commission's assertion that it remains ever vigilant to guard against the possibility that cable will threaten the economic viabilty of free, local broadcasting.

only on the effect of deleting the distant-signal and syndicated-exclusivity rules and "expressly assumed the continuation of the must carry rule[s]." Brief for respondents in No. 83-2050 at 11. That characterization is, at the very least, debatable. With the conclusions of the *Economic Inquiry Report* already in mind, the Commission, citing "administrative[] efficien[cy]," did explicitly exclude the must-carry rules from the proceedings that looked toward actual deletion of the distant-signal and syndicated-exclusivity rules. *Notice of Proposed Rulemaking*, 71 FCC2d 1004, 1006 (1979). TBS, however, focuses not on these rulemaking proceedings but on the antecedent *Economic Inquiry Report*.[46] That report, which was described by the Commission as "a general review of the economics of the relationship between television broadcasting and cable television," contains no such express reservation. *Notice of Proposed Rulemaking*, 71 FCC2d at 1005. Indeed, in embarking on its comprehensive economic analysis the Commission expressly excluded "debate over the merits of the existing regulatory" framework from its more "generalized inquiry." *Notice of Inquiry*, 65 FCC2d at 9-10.

More fundamentally, there is an obvious difference between reserving a matter for later consideration and holding its existence constant in the course of analyzing

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[46] The *Notice of Proposed Rulemaking* and the *Economic Inquiry Report* were adopted on the same day. The *Notice*, however, incorporated by reference the general findings of the *Economic Inquiry Report* and made clear that those findings were the predicate for its decision to institute rulemaking to delete the distant-signal-carriage and syndicated-exclusivity rules. The FCC directs our attention to references to mandatory carriage in the *Economic Inquiry Report*, *see* brief for respondents in No. 83-2050 at 11, *citing* 71 FCC2d at 658. But those passages merely describe the status quo; they contain no suggestion that the economic analysis depended on maintaining those regulations.

the interplay of other variables.[47] Although some of the studies relied on by the Commission may have tacitly assumed must-carry obligations in the markets under examination, its broad conclusion that cable television poses no "significant threat" appeared to rest largely on factors wholly unrelated to mandatory carriage. *Economic Inquiry Report*, 71 FCC2d at 661. Specifically, at least with respect to VHF licensees, the Commission looked to demographic trends, forecasts of the national economy, and the already abnormally high rate of return on investment earned by broadcasters to conclude that such broadcasters not only were not suffering unduly from competition from cable but could anticipate a "steady growth in * * * station revenues" in the future. *Id.* Far from "assum[ing] the continuation of the must carry rule[s]," the analysis of VHF stations appears to deny their major premise—that unfettered growth of cable television threatens the economic vitality of local broadcasting.

2.

But even if we accept that the Commission's position that it continues to stand by the economic assumptions on which the must-carry rules are premised, we would still be unable to conclude that it has adequately carried its heavy burden of justification. For if the FCC has not repudiated the rules' underlying assumptions, neither has it proved them. Twenty years ago the Commission acknowledged that it simply did not know what effect the advent of cable television would have on local television. *First Report and Order*, 38 FCC at 710 ("we think it impossible, with the data at hand, to isolate reliably the effects of CATV"). Relying on what it later described as "a more or less intuitive model" and its "collective instinct," *Notice of Inquiry*, 65 FCC2d at 9, 14, it con-

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[47] It is perfectly possible that an analysis focusing on one rule could reach conclusions that undercut the premises underlying another.

cluded that the threat to local television was sufficiently plausible to warrant promulgation of the must-carry rules. In light of the concededly speculative nature of its analysis, however, the Commission expressly recognized its "responsibility to get the facts * * * and to act upon them by revising or eliminating the restrictions on CATV as new information or experience more clearly illuminated the locus of the public's interest in the matter." *Economic Inquiry Report*, 71 FCC2d at 649-650 (footnotes omitted).

For many of its cable regulations, the Commission, with admirable vigor and creativity, has met its acknowledged responsibility to move beyond unsubstantiated intuition. For the must-carry rules, however, the Commission's promise "to get the facts" remains unfulfilled. *Id.* In the two decades since the rules' original promulgation, the Commission has never seriously examined any of the admittedly speculative links in the chain of reasoning advanced in support of the rules. In particular, it has never sought support for the assumptions that are the linchpins of its analysis: (1) that without protective regulations cable subscribers would cease to view locally available off-the-air television either because they would disconnect their antennas or because the inconvenience of a switching device would deter them; and (2) that even if some cable subscribers did abandon local television, they would do so in sufficient numbers to affect the economic vitality of local broadcasting. Indeed, as noted above, to the extent the Commission has addressed these issues at all, it has questioned their validity.[48]

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[48] In addition to casting doubt on the fragility of the economic health of many broadcasters, the Commission also appears to have denied that a switching device, such as an A/B switch, poses a significant barrier to receiving off-air signals. *In the Matter of Rules and Regulations to Require Carriage of Subscription Television Signals*, 77 FCC2d 523, 529 (1980). If, then, the act of flicking a switch is not a significant deterrent to viewing off-air signals, cable sub-

In short, here, no less than in *Home Box Office*, the FCC has failed to "put itself in a position to know" whether the problem the rule seeks to cure—the destruction of free, local television—"is a real or merely a fanciful threat." 567 F.2d at 50. That approach, we have concluded, falls far short of the burden the government must affirmatively bear to prove the substantiality of the interest served by the rules. *See First National Bank of Boston v. Bellotti*, *supra*, 435 U.S. at 786; *Preferred Communications, Inc. v. City of Los Angeles*, *supra*, 754 F.2d at 1406 n.9. Although in some instances "complete factual support * * * for the Commission's judgment or prediction is not possible or required," *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978), as we now explain, the particular circumstances of this constitutional challenge make continued deference to the Commission's concededly unsupported determinations plainly inappropriate.

We note first that, in sharp and unexplained contrast to its defense of the must-carry rules, the Commission itself now applies a far more rigorous standard of proof before crediting the broadcast industry's inevitable refrain that regulation is essential to protect it from the deleterious effects of new video technologies. As a matter of explicit agency policy, the Commission will consider such regulation only if presented with "hard evidence" that the new technology "will have a critically adverse effect on existing broadcast service." *DBS Inquiry*, 90 FCC2d at 689. "[S]peculative allegations concerning possible reductions in service from other sources" simply will not do. *Id.* at 691. Indeed, one Commissioner sur-

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scribers, if given such a switch, could still receive local broadcasts provided only that their antennas remained attached. Thus the economic rationale underlying the must-carry rules—preventing audience fragmentation with its concomitant impact on station revenues—turns on whether cable subscribers will actually disconnect their antennas. That purported phenomenon is almost certainly susceptible of empirical proof.

veyed the FCC's post-1979 regulatory and concluded that the Commission had effected a complete reversal of the burden of proof applied in assessing the need for cable regulations.

> In effect, [the Commission's initial policy toward cable] assumed harm to the public interest before it materialized and placed a heavy burden of proof on new technology and additional services to show that they would not injure the status quo. * * * As the [*Economic Inquiry Report*] makes plain, something more than mere conjecture or intuitive assumptions should be required before we impose regulatory constraints and burdens on one industry or technology in favor of another. * * * With these actions, the burden of proof is now where it properly belongs: on those seeking protection against competition, diversity, and innovation.

Economic Inquiry Report, 71 FCC2d at 949 (concurring statement of Commissioner Fogarty). In light of the Commission's express unwillingness to premise intrusive regulations on unsubstantiated speculation, we find it difficult to sustain the suggestion that we defer to the Commission's admittedly unproven belief that the must-carry rules in fact serve the substantial interest of protecting local broadcasting.

Moreover, this is demonstrably not an instance in which "complete factual support * * * for the Commission's judgment or prediction is not possible * * *." *FCC v. National Citizens Committe for Broadcasting*, *supra*, 436 U.S. at 814. When the FCC first asserted jurisdiction 20 years ago, the cable industry was in its infancy and its impact on local broadcasting could not be gauged with accuracy. In that historical context, courts faced with nonconstitutional claims concerning the breadth of the FCC's jurisdiction consistently and appropriately deferred to the Commission's admittedly speculative fears that the advent of cable television would displace local broadcasting. *See, e.g., United States v. Southwestern*

Cable Co., supra, 392 U.S. at 175. Nearly two decades have now passed, and the Commission has shown itself capable of the most sophisticated analysis of the effects of cable on conventional television. *See Economic Inquiry Report*, 71 FCC2d at 673. And yet, even in the context of a serious constitutional challenge, a context in which it must affirmatively bear the burden of proof, *Elrod v. Burns*, 427 U.S. 347, 362 (1976) (plurality opinion), it continues to rely on precisely the kind of "speculative allegations" it expressly refuses to credit elsewhere. *DBS Inquiry*, 90 FCC2d at 691. At some point, especially where First Amendment rights are at stake, the Commission must do more than ask us to defer to its "more or less intuitive model" and "collective instinct" to sustain its assertion that a rule is both necessary and important. *Economic Inquiry Report*, 71 FCC 2d at 634. Where, as here, the Commission itself has expressly acknowledged that its regulatory premises are susceptible of empirical proof[49] and, in fact, has demanded such proof as a prerequisite of regulation in analogous contexts, we believe that point has passed.

We reiterate that this case has not required us to decide whether, as an abstract proposition, the preservation of free, local television service qualifies as a substantial and important governmental interest. We hold only that in the particular circumstances of this constitutional challenge the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat. Should the Commission move beyond its "more or less intuitive model," as it clearly has the capacity to do, we would be extremely hesitant to second-guess its expert judgment. As long as it continues to

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[49] "Truths hitherto established by collective instinct may be verified * * * [or] disproved." *Notice of Inquiry*, 65 FCC2d at 14.

rely on wholly speculative and unsubstantiated assumptions, however, our powerful inclination to defer to the agency in its area of expertise must be tempered by our duty to assure that the government not infringe First Amendment freedoms unless it has adequately borne its heavy burden of justification. That, we have determined, the Commission has not done.

B. *The Congruence Between Means and Ends*

Even were we to conclude that the Commission adequately demonstrated the substantiality of the interest served by the must-carry rules, we could uphold their validity only if the restriction on activity protected by the First Amendment were "no greater than is essential to the furtherance of that interest." *Home Box Office, Inc. v. FCC*, *supra*, 567 F.2d at 48, *quoting United States v. O'Brien*, *supra*, 391 U.S. at 377. The task of evaluating the constitutional sufficiency of the congruence between the government's means and its ends is often a delicate one. On the one hand, we must, at the very least, make sure that the challenged regulation not gratuitously impinge on protected activity that poses no threat to the interest the agency is seeking to further. *United States v. Albertini*, 53 USLW 4844, 4848 (U.S. June 24, 1985). On the other hand, we must be careful not to lose sight of our proper role in the constitutional scheme. As this court recently had occasion to observe, our duty to police the First Amendment's requirement that intrusive governmental action be narrowly tailored to the evil sought to be corrected does not imply the authority to "fine-tune" administrative regulations. *White House Vigil for ERA Committee v. Clark*, 746 F.2d 1518, 1529 (D.C. Cir. 1984); *see also Clark v. Community for Creative Non-Violence*, 104 S.Ct. 3065, 3072 (1984). An agency typically has broad discretion over the manner in which it endeavors to effect its public interest objectives. Once we have determined that the agency action

falls within the wide range of constitutionally permissible regulatory options, our task is at an end.[50]

Fully aware of the breadth of the agency's discretion and the concomitant limits on the scope of our review, our analysis leaves us with no doubt that the must-carry rules, as currently drafted, represent a "fatally overbroad response" to the perceived fear that cable will displace free, local television. *FEC v. National Conservative Political Action Committee*, 105 S.Ct. 1459, 1470 (1985). We stress that "[w]e are not quibbling over fine-tuning * * *." *Id.* at 1471. For, as we now show, it is difficult to imagine a less discriminating or more overinclusive means of furthering the Commission's stated objectives.

1.

In the Commission's own words, the must-carry rules are designed to "maintain the availability of local broadcast service to both those who [are] cable subscribers and those who [are] not." *Opinion and Order*, *Turner* JA at 2. The goal is to assure that "as many communities as possible * * * have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs." *Economic Inquiry Report*, 71 FCC2d at 644, *quoting Sixth Report and Order*, 41 FCC 148, 172 (1952). Thus, and the distinction is critical, the rules seek to protect local broadcast*ing* and not local broadcast*ers*. As the Commission itself acknowledges, it "cannot reject a new [video] service solely because its entry will reduce the revenues or profits of existing licensees. * * * 'Plainly, it is not the purpose of the [Communications] Act to protect a licensee against competition but to protect the public.'" *DBS Inquiry*, 90

[50] The trick, of course, is to determine the contours of this "zone of constitutionality." *See White House Vigil for ERA Committee v. Clark*, 746 F.2d 1518, 1542 (D.C. Cir. 1984) (Wald, J., concurring in the judgment in part and dissenting in part).

FCC2d at 689, *quoting FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 475 (1940). *See also National Association of Broadcasters v. FCC*, 740 F.2d 1190, 1198 (D.C. Cir. 1984) ("existing licensees[] have no entitlement that permits them to deflect competitive pressure from innovative and effective technology"). Indeed, were the individual broadcasters themselves the object of the Commission's favors, the objective itself would be fundamentally illegitimate. In this regard, the Supreme Court's admonition in *Buckley v. Valeo*, *supra*, 424 U.S. at 48-49, bears repeating: "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment * * *."

2.

But, if the goal is to preserve "localism" and not "local broadcasters," the must-carry rules are "grossly" overinclusive. *Home Box Office, Inc. v. FCC*, *supra*, 567 F.2d at 50. The rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator. The 18th station is entitled to carriage no less than the first even if its programming is virtually duplicative of the viewing fare already transmitted over the cable system.[51] Indeed, it is entitled to carriage even if it carries no local programming at all.[52]

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[51] The Commission does not contest TBS's contention that in some instances cable operators are obligated to carry over 20 mandatory signals.

[52] This prospect is by no means entirely academic. Under the Commission's recently revised approach, broadcast licensees need no longer provide specified amounts of community-oriented programming, but instead can rely, at least in part, on the offerings of other local stations to satisfy their programming obligations. *Revision of Programming*, 49 Fed. Reg. at 33588, 33592-33594. Perhaps spurred by this change, sev-

We readily acknowledge that it is for the Commission as Congress' delegate and not this court to address the essentially legislative question of the optimal amount of

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eral broadcasters have announced plans to provide a full day of music videos, programming that, of course, is devoid of any local orientation at all. *Broadcasting*, June 25, 1984, at 50.

Commenting on the disparity between the rule's goal of preserving localism and the effect of its application to Quincy Cable, the dissenting Commissioner in *Quincy* observed:

> In the maze of arguments and counterarguments adduced in this matter it is easy to lose sight of the essential issue: who is to decide what programming this small cable system in this small town in central Washington shall provide its customers? In my view that decision should as a matter of policy, and perhaps as a matter of law, rest with Quincy Cable.
>
> Our "must carry" rules are intended to ensure that signals locally available over the air are not lost to customers who subscribe to a cable service and disconnect their antennas. That such customers could retain access to local signals by availing themselves of a switch or simply disconnecting the cable and reconnecting their antennas at any time may be put to one side. The important point in this case is that none of the signals in question appears to be "local", except perhaps in a Pickwickian sense. The choice is between signals imported either from Seattle or Spokane, with Seattle about 130 miles distant to the west and Spokane about equally distant to the east. There is no suggest[ion] that any of the stations target any of their programming to Quincy.
>
> * * * *
>
> * * * Since I believe the Commission's disposition of this case is wrong as a matter of policy, and even plain common sense, I find it unfortunate that Quincy Cable must either accede to that disposition or incur the expense of seeking review by the courts. If, however, it does seek review, I believe it may ultimately succeed in convincing the reviewing court that the regulation here in question is without rational justification and/or unconstitutional.

Quincy JA at 34-36 (Commissioner Jones, dissenting).

local service or programming in a given community. But in the context of the must-carry rules the FCC has simply never grappled with this issue. The rules themselves suggest an implicit determination that "more is better," but in those rare instances in which the Commission has intimated its views it has never taken so absolute a position. Indeed, in its most recent and comprehensive exposition of its regulatory objectives the Commission suggested that its goal was to preserve "a modicum of local programming," an objective significantly narrower than the undifferentiated sweep the must-carry rules would suggest. *Economic Inquiry Report*, 71 FCC2d at 661.[53] It is far from clear to us how a community that already has 17 local broadcast stations carried over the cable system is not already "enjoying the advantages that derive from having local outlets that will be responsive to local needs." *Id.* at 644.

It may well be that in some circumstances requiring carriage of the 18th broadcast station is consistent with the objective of preserving free, community-oriented television. And we certainly do not mean to imply that there is such a thing as too many communicative outlets in a given community. It is not the fact of the 18th station that is troubling, but the fact that it is guaranteed a channel even if carriage effectively bumps a cable programmer, regardless of the extent it impinges on the the cable operator's editorial autonomy, and irrespective of whether it thwarts viewer preferences. Given the substantial First Amendment costs implicit in this sweeping guarantee, the Commission must make some effort to move beyond the amorphous in defining the interest served by the must-carry rules. Until it establishes a

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[53] *Compare First Report and Order*, 38 FCC at 699 (stating that objective in 1965 was to assure a "large number of local outlets"). What constituted a "large number" was left unexplained. Similarly unexplained is how or whether the approximate doubling of the number of broadcast stations across the country since 1965 bears on this determination.

baseline for its general objective of preserving free, community-oriented television—measured by the number of local broadcast stations in the community, the amount of local programming, or any other criterion within its discretion to choose—we simply cannot know whether the rules are adequately tailored to pass constitutional muster. In this circumstance, the Commission has fallen far short of *its* "affirmative obligation" to show the requisite fit between means and ends. *Revision of Programming*, 49 Fed. Reg. at 33593 n.46.

3.

In addition to their complete indifference to the quantity of local television already available either over the air or on the cable system itself, the rules' overinclusiveness lies in their indiscriminate protection of every broadcaster regardless of whether or to what degree the affected cable system poses a threat to its economic well-being. Indeed, the Commission has expressly taken the position that the "financial health" of the broadcaster is irrelevant to its absolute right to occupy a channel on the local cable system. *First Report and Order*, 38 FCC at 713.[54] This blanket protection, by sweeping even the most financially secure broadcaster under the rules, beneficent mantle, reaches well beyond the rules' asserted objective of assuring that the advent of cable technology not undermine the financial viability of community-oriented, free television.

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[54] The Commission recently required a cable system to carry broadcast signals that could not be received over the air in the system's community. In this circumstance the rule is completely adrift from its economic rationale. The affected cable system could not possibly have been injuring the benefitted broadcaster by fragmenting its audience. *See Amendment of the Commission's Rules Regarding Major Television Markets*, 50 Fed. Reg. 2565, 2568-2569 (1985) (to be codified at 47 C.F.R. § 76.51) ; *see also* 57 Rad. Reg. (P&F) 1061 (dissenting statement of Commissioner Patrick).

Significantly, this complete absence of any effort to analyze the extent to which the must-carry rules further their stated objective is in sharp contrast to the Commission's analysis elsewhere. In the *Economic Inquiry Report*, for example, the Commission found that any cable-induced audience loss suffered by VHF licensees, who already "earn substantially more than a normal return on their tangible investment," takes place "in a context of offsetting factors [such as] [i]ncreases in population and in the level of economic activity," which "result in a fairly steady growth in the demand for advertising exposures and in station revenues." *Economic Inquiry Report*, 71 FCC2d at 661. If, in fact, "offsetting factors" render VHF broadcasters (or an identifiable subset of that group) relatively immune to the competitive impact of cable, then rules designed to guard against their demise or diminished profitability are clearly pointless. Yet, oblivious to the must-carry rules' primary object of protecting local broadcasters from competitive injury (and thus preserving localism), each and every broadcaster from the struggling UHF educational station to the most profitable VHF network affiliate—no matter how profitable, no matter how invulnerable to significant cable-induced revenue losses—can demand mandatory carriage.

We note again that it is for the Commission and not this court to ascertain which broadcasters or classes of broadcasters are sufficiently at risk to warrant protection. We observe only that the Commission's failure to draw any lines at all makes it impossible to conclude that it has satisfied its affirmative obligation to prove that the rules are "sufficiently tailored to the harms it seeks to prevent to justify its substantial interference" with First Amendment rights. *FCC v. League of Women Voters of California, supra*, 104 S.Ct. at 3124. At some point the goal of preserving localism becomes undiffer-

entiated protectionism.[55] Until the Commission makes some effort to demonstrate the contrary, the blunderbuss approach of the rules in their current form makes inescapable the conclusion that that point has been passed.

IV. Conclusion

Regulation of emerging video technologies requires a delicate balancing of competing interests. On the one hand, a regulatory framework that throttles the growth of new media or otherwise limits the number and variety of outlets for expression is likely to run afoul of the First Amendment's central mission of assuring "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. 1, 20 (1945). On the other hand, unfettered growth of new video services may well threaten other deeply ingrained societal values. In particular, the complete displacement of expressive outlets attuned to the needs and concerns of the communities they serve not only would contravene a long-standing historical tradition of a locally oriented press but might itself disserve the objective of diversity.

When the Commission strikes this balance in favor of regulations that impinge on rights protected by the First Amendment, it assumes a heavy burden of justification. As the Supreme Court made clear long ago, "Mere * * * preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." *Schneider v. State*,

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[55] Especially troubling is that the rules apply with equal force regardless of the degree of intrusion on First Amendment freedoms. They draw no distinction between cable systems that carry 100 signals and those that carry 12. Nor do they distinguish between systems that are saturated with must-carry signals and those that are not. Moreover, occasional exceptions aside, the waiver procedure has been demonstrably insensitive to these concerns. *See* note 13 *supra*.

308 U.S. 147, 161 (1939). Even where the infringement on protected First Amendment rights is incidental to the pursuit of other legitimate objectives, the government must affirmatively demonstrate that the regulation is narrowly tailored to serve a substantial interest.

After extensive examination of the purposes and effects of the must-carry rules, we have concluded that the Commission has failed to carry this heavy burden. After the passage of nearly two decades, and despite its demonstrated capacity to do so, the Commission has failed entirely to determine whether the evil the rules seek to correct "is a real or merely a fanciful threat." *Home Box Office, Inc. v. FCC*, *supra*, 567 F.2d at 50. Moreover, because the must-carry rules indiscriminately sweep into their protective ambit each and every broadcaster, whether or not that protection in fact serves the asserted interest of assuring an adequate amount of local broadcasting in the community, the rules are insufficiently tailored to justify their substantial interference with First Amendment rights.

We stress that we have not found it necessary to decide whether any version of the mandatory carriage rules would contravene the First Amendment. We hold only that in their current form they can no longer stand. Accordingly, with respect to petitioner Quincy, we vacate the order requiring compliance with the must-carry rules and imposing a fine for its failure to do so. With respect to petitioner TBS, we vacate the order that reaffirmed the constitutional validity of the rules as a basis for denying the petition for rulemaking. Given our general conclusion that the rules are unconstitutional, we need not confront the delicate question of our power to compel rulemaking. Should the Commission wish to recraft the rules in a manner more sensitive to the First Amendment concerns we outline today, it is, of course, free to do so. We would consider the constitutionality of the product of that effort at the appropriate time.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1984

No. 83-1283

QUINCY CABLE TV, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *Respondents*
KHQ, INCORPORATED, *et al., Intervenors*

No. 83-2050

TURNER BROADCASTING SYSTEM, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA, *Respondents*
METROMEDIA, INC., *et al., Intervenors*

Before WRIGHT, GINSBURG, and BORK, Circuit Judges.

ORDER

[Filed August 30, 1985]

It is ORDERED by the court, *sua sponte,* that the opinion filed July 19, 1985 in the above cases be, and it is hereby, amended as follows:

Page 6: Change "enes" at the beginning of line 12 of text to "ences"

Page 10: Change line 6 from the bottom of text to read:

Cable Co., supra, 392 U.S. at 174, *quoting* H.R. Rep.

Page 11: Insert a comma between "76.5" and "76.51," at the end of the first line of footnote 12

Change "76.5" at the end of the first paragraph of footnote 12 to "76.57"

Page 43: Change line 5 of text to read:

Part 73 of 47 C.F.R.) *(Revision of Programming)*. Details

Page 49: Insert the word "posture" after the word "regulatory" in line 1 of text

Page 56: Change the comma after the word "rules" in line 5 from the bottom of text to an apostrophe

Per Curiam

For the Court

/s/ GEORGE A. FISHER/SAB
George A. Fisher
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT.

No. 83-1283.

QUINCY CABLE TV, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents,*

KHQ, INCORPORATED, SPOKANE TELEVISION, INC., KING BROADCASTING COMPANY, ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, NATIONAL ASSOCIATION OF BROADCASTERS, TOWN OF QUINCY, WASHINGTON, *Intervenors.*

Argued 17 Jan. 1984.

Decided 30 March 1984.

Petition for Review of Orders of the Federal Communications Commission.

John P. Cole, Jr., Washington, D.C., with whom David M. Silverman, Washington, D.C., was on the brief, for petitioner.

Gregory M. Christopher, Counsel, F.C.C., Washington, D.C., with whom Bruce E. Fein, Gen. Counsel, Daniel M. Armstrong, Associate Gen. Counsel, F.C.C. and J. Paul McGrath, Asst. Atty. Gen., Robert B. Nicholson and Margaret G. Halpern, Attys., Dept. of Justice, Washington, D.C., were on the brief, for respondents.

Michael D. Berg, Washington, D.C., with whom Erwin Krasnow for National Association of Broadcasters, Washington, D.C., Arthur Stambler for Spokane Television, Inc., Edward W. Hummers, Jr. and David G. Rozzelle,

Washington, D.C., for King Broadcasting Co. were on the joint brief, for intervenors.

R. Russell Eagan, Washington, D.C., was on the brief for intervenor, KHQ, Inc.

J. Laurent Scharff, Jack N. Goodman and James M. Smith, Washington, D.C., were on the brief for intervenor, Association of Independent Television Stations, Inc.

Lewis J. Papers, Lawrence A. Horn, Nancy H. Hendry and Eric H. Smith, Washington, D.C., were on the joint brief for intervenors, Corporation for Public Broadcasting, et al.

Before WRIGHT, WILKEY and BORK, Circuit Judges.

Opinion PER CURIAM.

This case is a petition for review of orders of the Federal Communications Commission (the "FCC") requiring Quincy Cable T.V., Inc., to carry the signals of three commercial broadcast stations over Quincy Cable's cable television system. Quincy Cable contends that the FCC's orders violate the first amendment of the Constitution and are an unconstitutional taking of private property without just compensation. Quincy Cable further contests the lawfuless of a $5,000 forfeiture imposed on it by the FCC for Quincy Cable's failure to comply with an order of the Chief of the Cable Television Bureau of the FCC.

To our utter astonishment, the parties to this review presented significant factual developments to the Court on the eve of oral argument, which developments apparently were not considered by the FCC, despite their relevance to the legal contentions of the parties. Accordingly, we remand the record to the FCC for a determination of Quincy Cable's claims in light of the current facts pertaining to Quincy Cable's channel capacity, tier structure, and other

factual developments not considered in the record of the FCC's prior proceedings.

Quincy Cable operates a cable television station in Quincy, Washington, a town approximately 125 miles equidistant from Spokane and Seattle. At the time of Quincy Cable's initial petition to the FCC for an exemption from the FCC's "must carry" rule,[1] in November of 1979, Quincy Cable delivered 12 channels of video service to its subscribers. The programming of these 12 channels included three commercial network stations in Seattle, which were not viewable off-the-air in Quincy, and three commercial network stations in Spokane which were viewable off-the-air.[2] Quincy Cable sought to drop the three Spokane stations from its cable coverage, because it planned to replace those three commercial broadcasts with different programming not available to viewers in Quincy by means of the viewers' television antennas. It requested an exemption from the FCC's rule that requires a cable television system to carry, upon a broadcaster's request, the signals of each local, commercial broadcast television station.[3] Quincy Cable

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[1] The "must carry" rule provides:

> A community unit operating in a community located wholly outside all major and smaller television markets, as defined in § 76.5, shall carry television broadcast signals in accordance with the following provisions:
>
> (a) Any such community unit may carry or, on request of the relevant station licensee or permitee, shall carry the signals of . . . .
>
> (4) Commercial television broadcast stations that are significantly viewed in the community of the community unit.

47 C.F.R. § 76.57 (1982).

[2] *See* Joint Appendix (J.A.) at 38-40.

[3] *See supra* note 1.

claimed that the requirement that three of Quincy Cable's 12 cable channels be used to carry the Spokane stations' signals was a hardship to Quincy Cable and its subscribers.[4]

The Chief of the Cable Television Bureau denied Quincy Cable's request to discontinue carriage of the three Spokane stations in April of 1980.[5] (*Quincy I*) In its petition for reconsideration, Quincy Cable contended that the Bureau Chief's order was a violation of the first and fifth amendments of the Constitution and it sought a stay of the order requiring it to carry the three stations' signals on three of its 12 channels. The Bureau Chief denied Quincy Cable's request for reconsideration and dismissed its motion for a stay "as moot."[6] (*Quincy II*) The Chief's order was again challenged by Quincy and was again denied by the Bureau Chief in September of 1981.[7] (*Quincy III*) Quincy Cable promptly sought review by the full Commission of these three orders of the Bureau Chief. The full Commission affirmed the Bureau Chief in all respects and ordered Quincy Cable to pay a forfeiture of $5,000 for its refusal to abide by the orders of the Chief.[8] (*Quincy IV*) Quincy Cable sought reconsideration of the FCC's order, which was denied by the Commission in its Memorandum Opinion and Order of 17 February 1983.[9] (*Quincy V*) This petition for review ensued.

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[4] J.A. at 39-42.

[5] J.A. at 1-2.

[6] Memorandum Opinion and Order, 18 August 1981, J.A. at 3-9.

[7] J.A. at 10-11.

[8] Memorandum Opinion and Order, 22 April 1982, 89 FCC 2d 1128 (1982), J.A. at 12-22. After *Quincy I*, Quincy Cable dropped two of the Spokane stations from its cable carriage and did not resume carrying them until the full Commission issued *Quincy IV*.

[9] Memorandum Opinion and Order, 17 February 1983, J.A. at 23-36.

Each of the orders and opinions of the Bureau Chief and the Commission was premised on the fact that Quincy Cable operated a cable system of 12 channels, three of which were used to carry the signals of the commercial broadcast stations in Spokane under the FCC's "must carry" rule. In the briefs submitted to this Court on review, petitioner contended that the FCC's actions violated the first amendment by, in effect, proscribing the system from delivering new programs in the viewers' interests "because of the cable television station's limited capacity which permits a maximum of 12 channels of service. . . ."[10] Furthermore, the petitioner challenged the FCC's orders in this Court as a taking of private property without just compensation, in violation of the fifth amendment, because "the cable system is compelled to dedicate three of its 12 channel delivery service (25% of total capacity) to carriage of the programs and advertising messages of commercial television stations. . . ."[11]

One week before oral argument in this case, the Court was informed that Quincy Cable had expanded its channel capacity from 12 to over 30 channels.[12] We were subsequently informed that Quincy Cable's system had been rebuilt to reach a delivery capacity of 24 channels in June 1982 and that Quincy Cable was further renovated to reach its apparently current capacity of 32 channels in January of 1983, a full year before oral argument in this case. Quincy Cable's 32 channels are arranged on different tiers, and involve the use of convertors and varying rental charges for subscribers. Seven of the channels apparently are not currently filled with any programming. Although the technological expansion of Quincy Cable from 12 channels to

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[10] Brief of Petitioner at 12.

[11] Brief of Petitioner at 14.

[12] Supplemental Brief for Respondents at 2.

over 30 appears to have been fully effected before the FCC's final order in this case, the FCC's final order, the record, and the briefs submitted to us on review were all based on the factual predicate that Quincy Cable had a limited 12-channel capacity. When the inaccuracy of this factual premise was fully brought to light at oral argument, counsel for the FCC requested that the Court remand the record to the Commission for its consideration of Quincy Cable's claims in light of the expanded channel capacity and related factual developments.

We are unwilling to decide Quincy Cable's challenges to the FCC's actions on the basis of a factual record which, it turns out, may be highly inaccurate in substantial and relevant part. We, therefore, remand the record to the FCC for it to consider Quincy Cable's claims in light of the current facts, so that the FCC's decision, as well as any subsequent review by this Court, will be grounded on a proper factual basis. In so doing, we note that over three years passed between the date of Quincy Cable's initial request for an exemption from the "must carry" rule and the FCC's final order in this case. Because of this long lapse of time, we remand to the FCC with instructions that the matter be handled expeditiously and that a final determination be issued by the FCC within six months.

• • •

For the reasons stated above, the record herein is remanded to the FCC for further proceedings in accordance with this opinion. The Commission is directed to complete those proceedings and to return the record within six months from the date on which this opinion is issued. This panel will retain jurisdiction of the matter. We will consider this case upon the return of the record as supplemented and we will entertain appropriate motions if the FCC fails to take final action within six months.

It is so ordered.

APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RM - 3786 MM
FCC 84-136

In the Matter of

Petition for Rulemaking to Delete the Cable Television Mandatory Signal Carriage Rules

MEMORANDUM OPINION AND ORDER

Adopted April 6, 1984; Released: April 6, 1984

By the Commission: Commissioner Quello issuing a separate statement.

1. Pending is a petition filed on October 5, 1980 by Turner Broadcasting Systems, Inc., ("Turner") requesting commencement of a rulemaking proceeding to consider elimination of the cable television mandatory local television broadcast signal carriage rules.[1] On October 4, 1983, Turner filed a petition with the United States Court of Appeals for the District of Columbia Circuit, contending that the Commission had, in effect, denied the petition by failing to act on it and requesting that the Court order the agency to commence the requested rulemaking proceeding or act on the petition.

2. In summary form, the petition argues that the rules should be repealed for the following reasons: (1) they violate the First Amendment by requiring carriage of particular programming on cable systems; (2) they are not supported by any evidence of need or important governmental interest since the signals in question can be re-

[1] 47 C.F.R. Sections 76.55, 76.57, 76.59, 76.61 and 76.63.

ceived by cable subscribers through use of an A/B switch and an off-air antenna; and (3) they are unfair and anti-competitive in that they guarantee local stations cost-free cable disribution in contrast to cable origination services such a CNN which must pay for carriage or are unable to find channel capacity which might be available in the absence of must carry obligations.

3. We are not prepared to act favorably on this petition at this time, and, in light of the pending court proceeding, are issuing this opinion to explain the reasoning underlying that decision. But for the pendency of the court proceeding, we would have withheld action until staff resources had become available for a more in-depth examination of some of the issues involved. We recognize, however, that parties petitioning the Commission in the rulemaking context are entitled to have a Commission response and that in the absence of such action much time and effort would be occupied by this agency and by the Court of Appeals in what would at best be procedural arguments. We are, accordingly, issuing this opinion as an explanation of our belief that the proceeding requested should not be commenced at this time.

4. At the outset, as we have indicated in numerous decisions under the rules, the courts have reviewed the rules from a constitutional perspective and found them not in violation of the First Amendment or the Fifth Amendment. *Black Hills Video Corp. v. FCC,* 399 F.2d 65 (8th Cir. 1968).[2]

5. From a policy perspective, there are countervailing arguments both for keeping and for dispensing with these rules. In terms of the rationale for keeping the rules, it

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[2] These issues are again being addressed to some extent in *Quincy Cable TV, Inc., v. F.C.C.*, D.C. Cir. No. 83-1283 (filed May 31, 1983) (Record remanded to Commission March 30, 1984) and some further insight on these issues may come from the Court's decision in that case.

must be recognized that they were adopted because the Commission believed they were necessary to maintain the availability of local broadcast service to both those who were cable subscribers and those who were not. *Second Report and Order in Dockets 14895, 15233, and 15971*, 2 FCC 2d 725 (1966); *Cable Television Report and Order*, 36 FCC 2d 143, (1972). Protection of these interests has been recognized as a legitimate Commission objective. *E.g. U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

6. While in some contexts, service to one group in the population bringing some deprivation to another group might be considered simply the marketplace imposing its discipline on the allocation of goods and service, there are countervailing arguments in this instance. Petitioner's argument fails to note the nature of the marketplace in which cable operators currently negotiate for broadcast programming. Although cable systems are dependent upon access to television broadcast signals, these signals are available to cable systems without the necessity of direct negotiations with station owners or program providers by virtue of the compulsory copyright licensing system.[3] This system was adopted in 1976 with the apparent belief that continuance of the mandatory signal carriage rules was to be part of a legislative/regulatory package. It is contended that the existence of an A/B switch would be a satisfactory substitute for the mandatory carriage rules in terms of protecting access of off-air stations to cable subscribers and thus their viability and accessability to nonsubscribers. Our extensive experience with television broadcast reception in connection with implementation of the All Channel Receivers legislation suggests otherwise; even relatively minor receiver/tuner obstacles to reception may create significant impediments to viewing of stations and thus have substantial impact on their economic viability.

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[3] Public Law 94-553, 17 U.S.C. §§ 101 *et seq.* (1976).

7. With respect to arguments urging repeal of the rules, particularly from the perspective of cable subscribers and nonbroadcast program originators, we find factors that suggest reasons for review of these rules. These rules, as we have stated in the past, are intended to compel carriage of broadcast signals in place of alternate programming that subscribers, if given their choice, might otherwise choose. In this sense, they may work against the interest of one element of society—cable subscribers. Moreover, they force nonbroadcast program originators and distributors into a difficult competitive situation as compared with licensed broadcast stations. These programmers are not provided with a governmentally authorized local transmission facility, i.e., a broadcast frequency, for the distribution of their programming and their prime competitors (local stations) have free carriage on local cable television systems. This allocation of cable channels not only places competitors on an unequal footing but it also takes cable channels out of the marketplace where nonbroadcast program originators might otherwise have been able to negotiate for their use.

8. Thus, in the final analysis, the decision to retain or eliminate these rules involves a complicated balancing of considerations. We are not persuaded to proceed with the requested rulemaking proceeding at this time, however, because of the virtually complete absence of evidence in that request (or indeed from our own research or other sources) relating to the impact deletion of these rules would have on the television broadcast service received by the public. The rulemaking petition process exists, *inter alia,* to afford interested persons an opportunity to bring information to our attention which suggests that the underlying factual basis which led to the adoption of particular rules no longer exists. Turner Broadcasting has made no effort to supply us with that information and it is critical to any determination of whether a rulemaking proposal should be issued. Given the radical shift in competitive

relationship between the broadcast and cable television industries that changes in these rules could bring about, we believe a more complete factual base is needed before a proceeding of the type requested is commenced.[4]

9. We are also not persuaded, on the basis of the information contained in the petition, that this is a situation like that in *Geller v. F.C.C.*, 610 F. 2d 973 (D.C. Cir. 1979), in which evidence of changed circumstances mandated a formal review of the rules in question. In fact, two of the most significant changes that have occurred—growth in cable subscribership and growth in system channel capacity—have made carriage less burdensome and the impact of noncarriage more significant for local broadcast station operations. These changes would appear to support continuation of the rules rather than elimination. The growth of nonbroadcast cable services is clearly a factor that was anticipated when the rule were reaffirmed in the 1972 *Cable Television Report and Order*, 36 FCC 2d 143 (1972). The existence of A/B switches was recognized at an even earlier date, being at one point specifically mentioned in the mandatory signal carriage rules. In sum, we find no compelling changed circumstance of a type that would require commencement of the requested proceeding.

Accordingly, IT IS ORDERED, that RM-3786 filed by Turner Broadcasting System, Inc. IS DENIED.

FEDERAL COMMUNICATINS COMMISSION

William J. Tricarico
Secretary

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[4] Nothing herein should be taken to prejudge in anyway the issue of whether multichannel television sound should be included within the cable carriage requirement or to preclude the Commission revisiting this entire issue at a later date. The issue of multichannel sound carriage has been an issue in BC Docket 21323 (48 Fed. Reg. 37475) and a further proceeding on that issue is under consideration.

Separate Statement of
FCC Commissioner James H. Quello

In Re: Petition for Rulemaking to Delete the cable Television Mandatory Signal Carriage Rules (RM-3786).

I am writing to emphasize my continuing concern for the importance of the mandatory carriage rules as a means of ensuring that the public will not be denied access to local broadcast services. While new technologies are permitting broadcasters to offer a wide variety of services besides local broadcast programming, it is local program service that is the bedrock of Congress' regulatory scheme for telecommunications. In my view, it is one of this Commission's primary responsibilities to ensure the continued viability of local telecommunications services to the public, and I continue to believe that the mandatory carriage rules perform this essential function.

APPENDIX D

QUINCY I

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

April 28, 1980

In reply refer to: 4100-PP

Clifton W. Collins, President
Quincy Cable TV, Inc.
P. O. Box 127
7 'D' Street, S.W.
Quincy, Washington 98848

In re: Quincy Cable TV, Inc.
Quincy, Washington
CSR-1678; WA0295

Dear Mr. Collins:

On November 19, 1979, you submitted a letter to the Commission, requesting an opinion on your intention to discontinue carriage of Stations KXLY-TV (ABC, Channel 4), KHQ-TV (NBC, Channel 6) and KREM-TV (CBS, Channel 2), all Spokane, Washington, from your system serving Quincy, Washington. This letter was accepted as a petition for special relief on December 17, 1979, after the submission of an affidavit of service. On January 28, 1980, an opposition was filed to this petition on behalf of King Broadcasting Company, licensee of Station KREM-TV. Subsequently, on February 14, 1980, a second opposition was filed on behalf of KHQ, Inc., licensee of Station KHQ-TV.

As justification for your waiver request you state that Quincy, which receives both Seattle and Spokane signals, lies equidistant between the two communities. However, the residents of Quincy have a greater community of interest in the Seattle stations, particularly as they carry sports programming unavailable from Spokane. You argue that

the Spokane signals, which are received via translators, have a poor technical quality and a poll of the local residents indicates little support for their retention. Although, the Spokane stations are classified as significantly viewed in Grant County, Quincy Cable requests a waiver to delete these signals in favor of new programming of more interest to the community—Station WOR-TV (Ind., Channel 9), New York, New York, or ESPN, Nickelodeon, and Cable News Network. Finally, you contend that until such time as Quincy Cable can expand, KXLY-TV, KHQ-TV, and KREM-TV are easily available over the air and without their deletion any new programming would necessitate the use of converters, which would be an unfair economic hardship to the subscribers.

In their oppositions, both KREM-TV and KHQ-TV argue that Quincy Cable has failed to provide adequate justification for its waiver request. The stations maintain that viewer preference as to which signals should be carried is not sufficient grounds for waiver, and the Spokane signals' significantly viewed status and availability over the air speak for their importance to the community.

After careful consideration of the arguments, we are not persuaded that a waiver should be granted. Quincy Cable provides no evidence to support its claim of the technical inferiority of the Spokane signals. See *Missouri Valley TV Co., Inc.* (Chamberlain, South Dakota), FCC 76-948, 61 FCC 2d 696 (1976). Further, the assertion that the signals would be available over-the-air to any interested subscribers is insufficient grounds for waiver. The Commission's Rules require that all mandatory signals be carried upon request by the cable system. Consequently since carriage of their signals has been requested in this case by KREM-TV and KHQ-TV, the request for waiver to delete these stations will be denied. We note that the third Spokane signal KXLY-TV has not asserted its carriage rights in this proceeding, although it has been served copies of all

pleadings. We do not equate this silence with a lack of interest in its carriage. However since we have no formal record of a carriage request by KXLY-TV, we will serve counsel for Station KXLY-TV with a copy of this letter. Station KXLY-TV will be given fifteen (15) days from the date of this letter to assert its mandatory carriage rights or Quincy Cable will be permitted to delete the signal. A copy of that carriage request, if any, should be sent to the Chief, Cable Television Bureau.

In view of the foregoing, pursuant to Section 0.299(i) of the Commission's rules the petition for special relief, filed by Quincy Cable TV, Inc., is hereby denied.

Sincerely,

/s/ Lauren J. Beluix
Willard R. Nichols, Chief
Cable Television Bureau

cc: R. Russell Eagan, Esq.
Kirkland & Ellis

Edwards W. Hummers, Jr., Esq.
Fletcher, Heald & Hildreth

Arthur Stambler, Esq.
Lovett, Ford & Hennessey, P.C.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

002764

CSR-1678
(WA0295)

In re:

QUINCY CABLE TV, INC.
Quincy, Washington

Petition for Reconsideration
Motion for Stay

MEMORANDUM OPINION AND ORDER

Adopted: August 10, 1981 Released: August 18, 1981
By the Acting Chief, Cable Television Bureau:

1. On May 28, 1980, Quincy Table TV, Inc. filed a "Petition for Reconsideration" of the Chief, Cable Television Bureau's decision by letter dated April 28, 1980 denying its original "Petition for Special Relief." In its special relief petition, Quincy asked for a waiver of the Commission's mandatory signal carriage rules to delete the carriage of three must-carry stations [KREM-TV (CBS, Channel 2), KXLY-TV (ABC, Channel 4) and KHQ-TV (NBC, Channel 6), all Spokane, Washington] in favor of more diverse programming. In addition to its "Petition for Reconsideration" Quincy simultaneously filed a "Motion for Stay" requesting that the Commission preserve the *status quo* pending resolution of Quincy's reconsideration petition.[1] In its motion, Quincy informed the Bureau that it deleted the carriage of Stations KHQ-TV and KLXY-TV

[1] In view of our decision today based upon the merits of Quincy's reconsideration petition, we are dismissing Quincy's "Motion for Stay" as moot.

on January 5 and 12, 1980, respectively. Stations KREM-TV, KXLY-TV and KHQ-TV have filed oppositions to Quincy's reconsideration petition and "Motion for Stay", to which Quincy has replied. Additionally, on October 23, 1980, Station KHQ-TV filed a "Petition to Institute Forfeiture Proceeding" against Quincy for its failure to carry Station KHQ-TV, to which Quincy has responded.

2. In its reconsideration petition, Quincy argues that the main issue to be resolved in this proceeding is whether or not it should be required to carry three stations which are located approximately 135 miles from the community it serves in lieu of programming which is more diverse. In support of its petition, Quincy contends that in denying its original special relief request, the Chief, Cable Television Bureau applied rules of doubtful constitutional validity interfering with its editorial judgment not to carry the three Spokane, Washington stations in question. In this regard, Quincy maintains that the Commission's mandatory signal carriage rules conflict with the basic protections provided by the First and Fifth Amendments of the Constitution of the United States. Furthermore, Quincy points out that even if a waiver were granted in this proceeding its subscribers would still be able to view the three objecting stations off-the-air since they all broadcast on UHF frequencies, and Quincy's system only utilizes its subscribers television sets' VHF channels.[2]

3. In their oppositions, the objecting stations contend that Quincy's reconsideration petition is procedurally defective and should therefore be dismissed. Basically, the objecting stations assert that the facts relied upon by Quincy in its earlier petition have not changed and since

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[2] Although all three objecting stations operate on VHF frequencies at their city of license, the stations are available to viewers in the community served by Quincy via translators which operate on UHF frequencies.

Quincy has not introduced any new factual evidence, its petition does not meet the requirements set out for reconsideration in Section 1.106(c) of the Commission's Rules. Moreover, the objecting stations argue that since Quincy's constitutional arguments were not raised in its original special relief pleading they should not be considered by the Commission.[3] Substantively, the objecting stations point out that it is undisputed that Section 76.57 of the Commission's Rules require Quincy to carry them. In response to Quincy's constitutional arguments, the objecting stations contend that these same arguments have been rejected by the Commission and the Courts on numerous occasions. In response to Quincy's argument that the three Spokane stations could be received off-the-air in the event a waiver was granted, the objecting stations maintain that this same argument was rejected in the Chief, Cable Television Bureau initial decision, and accordingly, it should not be readdressed at this juncture. Lastly, Station KHQ-TV has requested that the Commission issue a forfeiture directed against Quincy for its alleged willful and repeated failure to comply with Section 76.57(a) of the Commission's Rules, which mandates Quincy's carriage of Station KHQ-TV. Station KHQ-TV also maintains that its signal was illegally discontinued by Quincy on or about January 5, 1980, while Quincy's original petition for special relief was still pending before the Commission.[4]

4. In its reply, Quincy reiterates its argument regarding the availability of the three stations off-the-air. Quincy also contends that it should receive a waiver because none of the objecting stations have demonstrated any special

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[3] In view of the fact that the Bureau is denying Quincy's reconsideration petition based upon its merits, no public interest consideration would be served by the Bureau addressing the procedural issues raised by the objecting parties.

[4] Station KXLY-TV has also requested that the Commission issue a forfeiture against Quincy based upon Quincy's failure to carry it.

efforts to serve the citizens of Grant County, Washington, in which Quincy's cable system is located. In response to the contention that its constitutional arguments are without merit, Quincy maintains that the objecting parties have relied upon a line of cases which have been repudiated by the U.S. Court of Appeals for the District of Columbia Circuit. Lastly, Quincy contends that none of the objecting stations had perfected their must-carry status prior to the filing of its original special relief petition. Consequently, Quincy maintains that the filing of its special relief petition invoked the automatic stay provisions of Section 76.7(g) of the Commission's Rules, and therefore the issuance of a forfeiture is not warranted.

5. After considering the evidence presented, we find Quincy's reconsideration petition to be unpersuasive. In response to Quincy's constitutional arguments, we note that the validity of the Commission's signal carriage rules has previously been challenged on both First and Fifth amendment grounds and has been found to be constitutional. In *Black Hill Video Corp. v. FCC*, 399 F.2d 65 (8th Cir., 1968), the Court specifically considered and rejected a constitutional challenge to the signal carriage rules, holding that "[P]etitioner's contentions that the regulations adopted violate their constitutional rights lack merit." Furthermore, in *United States v. Midwest Video Corp.*, 406 U.S. 659, n. 17 (1972), the Supreme Court of the United States cited *Black Hills, supra,* in concluding that the rules had been ". . . correctly upheld by the courts of appeal as within the guidelines of [*United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)]." The Supreme Court reconfirmed the above finding regarding the current signal carriage rules at note 16 of its decision in *Federal Communications Commission v. Midwestern Video Corporation et al.*, 440 U.S. 689 (1979).

6. Additionally, Quincy contends that should a waiver be granted the objecting stations would nevertheless still be

available off-the-air by means of a switching device on its subscribers' television sets. In the *First Report and Order in Docket 14095,* 38 FCC 683, 702 (1965) the Commission considered allowing cable operators to fulfill their must-carry obligations by means of an off-the-air switch but concluded that such an approach would not be in the public interest. See also *Second Report and Order in Docket 14895,* FCC 66-620, 2 FCC 2d 725 (1966). Lastly, Quincy maintains that a waiver is warranted because none of the objecting must-carry stations have shown that they have made a special effort to serve Quincy's subscribers. However, the Commission has held that such a showing need not be made by a must-carry station requesting carriage on a local cable television system. See *Fetzer Cablevision* (Kalamazoo, Michigan), FCC 75-12, 50 FCC 2d 737 (1975).

7. In regard to the requested forfeiture, Stations KHQ-TV and KXLY-TV's main contention is that Quincy violated the Commission's must-carry rules when it deleted its carriage of Stations KHQ-TV and KXLY-TV in the midst of its pending request for special relief. However, a review of the sequence of events in the matter reveals that Quincy did not in fact violate the must-carry rules when it deleted the two stations. The signal carriage rules at Section 76.57 (a) state in pertinent part that "Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of: . . ." Consequently, no station is an automatic "must carry" station. To acquire must-carry status a station must first assert its right by formally requesting carriage on the relevant cable system. Long term carriage, in itself, does not establish such carriage rights. In the instant case, none of the Spokane signals had asserted their carriage rights on the Quincy system as of the time Quincy initially filed its special relief petition. The objections filed to Quincy's original petition for special relief by Station KREM-TV and KHQ-TV, which the Commission construed to be these stations' request for carriage, were filed after Quincy's deletion of

both stations and subsequent to the filing of Quincy's original petition for special relief. Indeed, KXLY-TV asserted its carriage rights only after the Commission requested it do so, upon the denial of Quincy's special relief petition.

8. In view of the above, we find that Quincy's filing of its original petition for special relief invoked the automatic stay provisions of Section 76.7 of the Commission's rules. Consequently, the imposition of a forfeiture against Quincy for its failure to carry Stations KHQ-TV and KXLY-TV would not be appropriate. However, it is well settled that the mere filing of a petition for reconsideration does not toll the operation of an order. See *e.g.* Section 1.102(b)(2) of the Commission's Rules. Therefore, its petition for reconsideration having failed, Quincy shall be ordered to resume carriage of Stations KREM-TV, KXLY-TV and KHQ-TV within ten days after the release date of this opinion, and it shall advise the Bureau within twenty days of the release date of this opinion that it has in fact resumed carriage of the above three stations.[5] Although these requirements will necessitate that Quincy act promptly to restore carriage of the above stations, it is noted that such compliance periods are neither unprecedented (See *e.g., Willmar Video, Inc.* (Willmar, Minnesota), FCC 68-439, 12 FCC 2d 612 (1968) or unjust—particularly in view of the fact that Quincy should already be in compliance with the terms of the previous order. Quincy is hereby cautioned that failure to comply in the manner indicated will subject the system to the institution of forfeiture proceedings pursuant to Section 503(b) of the Communications Act, as amended, and Section 1.80 of the Commission's rules. In addition, we note that pursuant to Section 503(b)(2) and

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[5] It is unclear from the pleadings whether or not Quincy dropped its carriage of Station KREM-TV. In the event Quincy is not presently carrying Station KREM-TV, Quincy is ordered pursuant to this decision to reinstate its carriage of this station.

Section 1.80(b)(2) of the Commission's Rules, each day of the continuing violation may constitute a separate finable offense. However, in view of the fact that Quincy is expected to promptly achieve compliance with the Bureau's April 28, 1980, decision, the Bureau does not intend to institute forfeiture proceedings at this time for any failure to comply to date.

In view of the foregoing, we find that grant of the above-captioned petition for reconsideration would not be in the public interest.

Accordingly, pursuant to authority delegated by Section 0.288(i) of the Commission's Rules, IT IS ORDERED, That the "Petition for Reconsideration" filed by Quincy Cable TV, Inc., directed against the Chief, Cable Television Bureau's decision released April 28, 1980, IS DENIED.

IT IS FURTHER ORDERED, pursuant to authority delegated by Section 0.288(i) of the Commission's Rules, That Quincy Cable TV, Inc. shall resume carriage of Stations KREM-TV, KXLY-TV and KHQ-TV within ten (10) days after the release date of this order, and shall notify the Chief, Cable Television Bureau of its carriage of Station KALB-TV within twenty (20) days after the release date of this order.

FEDERAL COMMUNICATIONS COMMISSION

/s/ WILLIAM H. JOHNSON
William H. Johnson, Acting Chief
Cable Television Bureau

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
September 2, 1981

In reply refer to 4410-RP

John Cole, Esq.
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

In re: *Quincy Cable TV, Inc.*
Quincy, Washington
WA0295
CSR-1678

Dear Mr. Cole:

We are in receipt of your letters of August 20, 26, and 27, 1981, in which you request the Chief, Cable Television Bureau to rescind or withdraw the Bureau's decision in Quincy Cable TV, Inc. (Quincy, Washington) Mimeo No. 002764, released August 18, 1981.

In the above decision, the Chief, Cable Television Bureau, acting pursuant to delegated authority, denied the "Petition for Reconsideration" you filed on behalf of your client, Quincy Cable TV, Inc. By denying Quincy's reconsideration petition, the Chief, Cable Television Bureau upheld the initial decision which denied Quincy's special relief request that it be relieved of its obligation to carry three must carry television stations. Furthermore in its reconsideration decision, the Bureau concluded that Quincy had an obligation to carry the three stations at issue commencing from the time of the effective date of its initial decision. Lastly, in the expectation that Quincy would in the future voluntarily come into compliance with the Commission's signal carriage rules, the Bureau granted Quincy a ten day

period within which it was to commence carriage of the three must carry stations or face appropriate administrative sanctions.

In your letter of August 20, 1981, you maintain that the Bureau's action of granting Quincy ten days to come into compliance with the Commission's rules is in direct conflict with the provisions of Section 408 of the Communications Act of 1934 which provides for a thirty day period. Moreover, you allege that the "automatic" stay provisions of Section 76.7(g) of the Commission's rules precluded the Bureau's finding, in its reconsideration decision, that Quincy had an obligation to carry the three stations in question subsequent to the Bureau's initial decision. In this regard, you allege that under the provisions of Section 76.7(g) of the Commission's Rules, Quincy's filing of a stay petition contemperanously with its reconsideration petition relieved it from its obligation of carrying the three must carry stations during the pendency of its reconsideration petition.

In your letter of August 27, 1981, you state that Quincy intends to file a "Petition for Review" of the Bureau's actions in this proceeding before the Commission. Consequently, you have requested that the Bureau stay its previous orders pending the outcome of Quincy's review petition.

In view of the fact that Quincy has failed to make the requisite showing necessary for the issuance of a stay under the precedent set in *Virginia Petroleum Jobbers Association v. Federal Power Commission,* 259 F.2d 921 (D.C. Cir. 1958), the Bureau has no basis upon which a stay can be issued in this proceeding. Moreover, since the Commission's rules prohibits the filing of a reconsideration of a denial of a reconsideration petition the other issues raised in your letters should be argued before the Commission in the context of Quincy's review petition. See *Durfee's TV Cable Co.* (Parkersburg, West Virginia), FCC 68-222, 11 FCC 2d 979 (1968).

The above action is taken pursuant to delegated authority under Section 0.288(i) of the Commission's Rules.

Sincerely,

/s/ WILLIAM H. JOHNSON
William H. Johnson, Acting Chief
Cable Television Bureau

cc: Russell Eagan, Esq.
Arthur Stambler, Esq.
Edward Hummers, Jr.

FCC 82-193
QUINCY IV

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CSR-1678
(WA0295)

In re:

QUINCY CABLE TV, INC.
Quincy, Washington

Application for Review
Motion for Stay

MEMORANDUM OPINION AND ORDER

Adopted: April 22, 1982; Released: May 5, 1982

BY THE COMMISSION: COMMISIONERS JONES AND RIVERA CONCURRING IN THE RESULT.

Introduction

1. On November 27, 1979, Quincy Cable TV, Inc., requested a waiver of Section 76.57 of the rules (the cable television mandatory signal carriage rules) in order to delete from its cable system in Quincy, Washington three television broadcast signals.[1] Quincy argued that the signals

[1] The three television stations are KREM, KHQ-TV, and KXLY-TV, licensed to Spokane, Washington. Stations KHQ-TV, KXLY-TV and KREM-TV are entitled to mandatory carriage on the Quincy cable system pursuant to Section 76.57(A)(4) of the Commission's Rules since they are significantly viewed in Grant County, Washington, the county in which Quincy's cable system is located. Furthermore, Stations KHQ-TV and KXLY-TV are also entitled to mandatory carriage pursuant to Section 76.57(a)

in question could be received over-the-air without cable so that carriage was unnecessary and that the channels occupied by these signals were needed to carry alternative programming not otherwise carried on the system. This petition was denied by the Chief, Cable Television Bureau in a decision adopted under delegated authority.[2] *Quincy Cable TV, Inc.* (Quincy, Washington), action of April 28, 1980, Public Notice released May 2, 1980. Quincy then sought reconsideration of this decision, urging that the rules in question conflicted with the First and Fifth Amendments to the Constitution. That reconsideration petition was also denied under delegated authority. *Quincy Cable TV, Inc.* (Quincy, Washington), Mimeo No. 002764, released August 18, 1981, (hereinafter "*Order*"). Also denied for failure to make the showing required by *Virginia Petroleum Jobbers Association v. Federal Power Commission,* 259 F.2d 921 (D.C. Cir. 1958), was a request for stay of that decision.

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(2) of the Commission's Rules since their signals are carried by 100 watt translator stations, K83AJ and K77AO, respectively, which serve the community of Quincy, Washington. All three stations were being carried at the time Quincy's waiver petition was filed. However, none of the stations had perfected its mandatory carriage rights by making a formal request for carriage on the Quincy system. After filing for waiver, Quincy deleted the signals of Stations KHQ-TV and KREM from carriage. Stations KHQ-TV and KREM subsequently filed oppositions to Quincy's waiver request, which the Cable Television Bureau construed as those stations' formal request for carriage. Station KXLY-TV did not file an opposition. Apparently, Quincy did not delete that station from carriage.

[2] More specifically, the decision denied Quincy's request for special relief to delete Stations KHQ-TV and KREM. The decision also stipulated that Quincy's request for waiver to delete carriage of Station KXLY-TV was similarly denied unless that station failed to make a formal request for carriage by May 13, 1980. KXLY-TV filed its formal request on May 7, 1981.

2. Now pending is a petition for review of the Bureau Chief's *Order* denying reconsideration of Quincy's waiver request. KHQ, Inc., licensee of Station KHQ-TV (NBC, Channel 6), and King Broadcasting Co., licensee of Station KREM-TV (CBS, Channel 2), both licensed to Spokane, Washington, have opposed this petition.[3]

Summary of Arguments

3. In support of its petition for review, Quincy maintains that the Cable Television Bureau's *Order* is both substantively and procedurally defective. Substantively, Quincy first contends that the Commission's mandatory signal carriage rules are impermissible under the 1st and 5th Amendments of the Constitution of the United States. Quincy also argues that the courts recently have discredited the constitutionality of the signal carriage rules and, consequently, the Commission's ability to impose such regulations. Therefore, Quincy argues, the Bureau cited case law which either

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[3] Quincy has additionally filed a motion to stay the effectiveness of the Cable Television Bureau's *Order* pending the outcome of this proceeding. In light of our action today denying Quincy's petition for review, we are dismissing its motion for stay as moot under Section 1.102(b)(3) of the Rules. On October 2, 1981, Quincy filed a "supplement" to its petition for review to request that the Commission additionally examine the merits of the Bureau's September 2, 1981 decision declining to reconsider its own Reconsideration decision. Station KHQ-TV filed an opposition to Quincy's supplement, to which Quincy did not reply. Station KREM-TV filed a motion to strike Quincy's supplement, which Quincy opposed, and a reply to Quincy's opposition. Station KXLY-TV also opposed Quincy's supplement and, in addition, requested that forfeiture proceedings be initiated against Quincy for its failure to comply with the signal carriage rules. Quincy filed a response to Station KXLY-TV's opposition and request for forfeiture. In view of our decision today to affirm the Cable Television Bureau's *Order*, we are dismissing Quincy's request for review of the Bureau's September 2, 1981 letter as moot.

has been repudiated or is inapposite to the constitutional issues raised. Second, Quincy contends that even assuming *arguendo* the constitutionality of the Commission's mandatory signal carriage rules, the Bureau erred in denying its waiver request. Quincy maintains that it already carries three network stations licensed to Seattle, which its subscribers prefer to view; that its subscribers have no interest in viewing the Spokane stations; and that the Spokane stations broadcast signals of inferior technical quality. Quincy contends that these factors should relieve it of any obligation to carry the Spokane stations. Therefore, Quincy maintains that adequate substantive grounds exist to warrant Commission reversal of the Cable Television Bureau's *Order*.

4. Procedurally, Quincy contends that the Bureau's *Order* is defective in three respects. First, Quincy maintains that the Bureau incorrectly interpreted the "automatic stay" provisions of Section 76.7(g) of the Commission's Rules.[4]. Quincy contends that the Bureau's *Order* erroneously found that the stay provisions of Section 76.7(g), which relieve Quincy of any obligation to carry the Spokane signals, terminated when Quincy's original waiver petition was denied by the Bureau. Instead, Quincy argues that the "automatic stay" provisions are effective in all "further proceedings" regarding its waiver request and, in fact, do

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[4] Section 76.7(g) reads, in pertinent part, that "Where a petition for waiver of Section 76.57(a) . . . is filed within fifteen (15) days after a request for carriage, a system community unit need not carry the signal of the requesting station pending the Commission's ruling on the petition or the question of temporary relief pending further proceedings." Although Quincy's petition was filed prior to the Spokane stations' request for carriage, the Cable Television Bureau determined that adequate justification existed for finding that Quincy had invoked the automatic stay provisions of Section 76.7(g). See discussion at paragraphs 7-8, *Order*. Quincy does not dispute this finding.

not terminate until the Commission itself renders a final administrative decision in this matter. Consequently, Quincy maintains that it is not under any obligation to carry the deleted Spokane signals unless the Commission itself so orders. Secondly, Quincy contends that the Bureau erred in dismissing its motion for stay as moot. In this regard, Quincy maintains that its purpose in requesting a stay of the Bureau's April 28, 1980 letter decision was to protect its constitutional rights from irreparable injury. Consequently, Quincy argues that by failing to consider this request separately, the Bureau denied it due process. Finally, Quincy contends that the Cable Television Bureau violated Section 408 of the Communications Act by directing Quincy to resume carriage of the Spokane stations within ten days of the *Order*'s August 18, 1981 release date. Quincy states that the language of Section 408 explicitly mandates that no order of the Commission shall be effective until at least 30 days have elapsed after its service. Here, Quincy argues, it was required to achieve compliance with the signal carriage rules by August 28, 1981, even though it was not served with a copy of the *Order* which mandated this compliance until September 2, 1981, four days later. Therefore, Quincy maintains, the Bureau's *Order* is unlawful and void for its inadequate notice.

5. In their oppositions to Quincy's petition for review, the objecting stations contend that Section 76.57 of the Rules clearly requires Quincy to carry their signals and that none of the arguments Quincy advances obviates its obligation to comply with the Commission's Rules. In response to Quincy's constitutional arguments, the objecting stations maintain that the Bureau's *Order* correctly determined that identical 1st and 5th Amendment challenges to the mandatory signal carriage rules have been rejected repeatedly by both the Commission and the Courts. The objecting stations additionally contend that Quincy's procedural arguments are without merit. First, they argue that

the Bureau's *Order* correctly determined that the "automatic stay" provisions of Section 76.7(g) were terminated by the Bureau's action denying Quincy's original petition for waiver. Thus, the objecting stations maintain, Quincy is in violation of Commission rules for failing to reinstate carriage of their "must carry" signals after that action. Second, the objecting stations argue that since actions on motions for stay are discretionary under Commission Rules, the Bureau's action to dismiss Quincy's request did not deprive it of any "interest" or entitlement protected by the 5th Amendment. Third, the objecting stations contend that the Bureau's ten day ordering clause was in full compliance with the Communications Act and the Commission's Rules.

Discussion

6. Having carefully examined the pleadings before us, we conclude that Quincy has raised no arguments in its petition for review which would warrant our reversing the Cable Television Bureau's *Order* on either procedural or substantive grounds. We turn first to the procedural arguments Quincy raises. Quincy argues that the language of Section 76.7(g) explicitly provides that it need not carry the Spokane stations until the Commission itself makes a final decision on the merits of its waiver petition. Quincy further contends that since the "automatic stay" provisions of Section 76.7(g) are still in effect, the Bureau erred in finding that Quincy was not in compliance with the mandatory signal carriage rules for its failure to carry all three Spokane stations after the Bureau denied its initial waiver petition (*Order*, at paragraph 8). Both of these contentions are without merit. The Commission has promulgated Rules which delegate authority to its staff pursuant to Section 5(d) of the Communications Act of 1934, as amended.[5] In Sections 0.201(a)(1) and 0.288(i) of the Rules,

[5] Sections 0.201 to 0.387 of the Rules were issued under authority

the Commission has provided the Chief, Cable Television Bureau, with delegated authority to act on petitions for waiver of the Commission's cable television regulations. The Commission has additionally provided the Chief, Cable Television Bureau, in Sections 0.204(a) and (d) of the Rules, with the authority to exercise this delegated authority by issuing orders, decisions, or other action documents as letters or captioned orders. Finally, Section 0.203 confers upon the Chief, Cable Television Bureau, "... all the jurisdiction, powers, and authority conferred by law upon the Commission," and expressly provides that:

> Except as provided in Section 1.102 of this chapter, any action taken pursuant to delegated authority shall have the same force and effect and shall be made, evidenced, and enforced in the same manner as actions of the Commission.[6]

7. In light of the foregoing, we find that the Chief, Cable Television Bureau's letter decision in *Quincy Cable TV, Inc.* (Quincy, Washington), action of April 28, 1980, Public Notice released May 2, 1980, must be construed as having the "same force and effect" as an action by the Commission itself on Quincy's waiver request. The Bureau's decision denied Quincy's request to delete Stations KHQ-TV and KREM. This decision additionally stipulated that Quincy's request for a waiver to delete Station KTXL-TV was denied if that station filed a formal request for car-

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of Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, and are found at "Subpart B—Delegations of Authority," in Part 0 of the Rules on Commission Organization.

[6] Section 1.102(b)(3) gives the Commission the discretion to stay certain delegated actions pending Commission review. As indicated in note 1, *supra*, we do not find that a stay of the Bureau's decision is appropriate.

riage by May 13, 1980.[7] Pursuant to Section 1.102(b)(1) of the Commission's Rules, this letter decision respecting Stations KHQ-TV and KREM became effective on May 2, 1980, the date public notice of the Bureau's action was released.[8] On that date, the automatic stay provisions of Section 76.7(g) terminated. Thus, as of May 2, 1980, Quincy was obligated to comply with the Commission's mandatory signal carriage rules by carrying Stations KHQ-TV and KREM on its system. Quincy has not resumed carriage of those stations. Therefore, Quincy has been in violation of the Commission's mandatory signal carriage rules since May 2, 1980.

8. We additionally find no merit in Quincy's allegation that it was denied due process by the Chief, Cable Television Bureau's action of dismissing its motion for stay as moot (*Order*, at note 1). In this regard, Quincy contends that since it petitioned for a stay to protect its constitutional rights from irreparable injury, the Bureau erred when it failed to consider the merits of its request. We find that Quincy was not denied due process when the Bureau dismissed its request for stay. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Here, Quincy based its claim of irreparable injury in its motion

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[7] Station KXLY-TV timely filed its formal request for carriage on May 7, 1981.

[8] Section 1.102(b)(1) provides: "Non-hearing or interlocutory actions taken pursuant to delegated authority shall, unless otherwise ordered by the designated authority, be effective upon release of the document containing the full text of such action, or in the event such a document is not released, upon release of a public notice announcing the action in question." Accordingly, pursuant to stipulation by the Chief, Cable Television Bureau, on May 7, 1980, the date that Station KXLY-TV made its formal request for carriage, Quincy's request to delete KXLY-TV's signal was also denied.

for stay on allegations that the mandatory signal carriage rules violated its constitutional rights. Quincy raised the identical constitutional arguments against the Commission's mandatory signal carriage rules in its petition for reconsideration. The Bureau's *Order* directly addressed the constitutional issues that Quincy raised in its reconsideration petition. (*Order,* at paragraph 5). Since the Commission's mandatory signal carriage rules have been upheld as not constituting a violation of liberty or property rights under the 1st and 5th Amendments, the Bureau correctly rejected Quincy's arguments in its *Order* denying Quincy's reconsideration petition.[9] Accordingly, the allegations of irreparable injury which formed the basis for Quincy's motion for stay had no merit, and the Bureau appropriately dismissed Quincy's motion under Section 1.102(b)(2) of the Rules.[10] Therefore, we find Quincy's contention that it was deprived of liberty or property interests without fair hearing to be wholly without merit.[11]

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[9] See discussion at paragraphs 10-13, *infra.*

[10] Section 1.102(b)(2) of the Rules provides that if a party files for reconsideration of a non-hearing action taken pursuant to delegated authority the "designated authority"—here, the Chief, Cable Television Bureau—may exercise discretion over grant of a stay pending disposition of the reconsideration petition.

[11] Quincy had also raised questions relating to whether the Bureau's order requiring compliance with the mandatory signal carriage rules by August 23, 1981 (ten days after the release of the order), was in conflict with Section 408 of the Communications Act. Because more than seven months have now passed during which Quincy has continued not to comply with the requirements of the mandatory signal carriage rules, a resolution of this question is not now necessary. It should be noted, however, that Quincy's obligation to carry the signals here in question derives from the rules themselves and that the order in question had the effect of extending, rather than reducing, the time for its coming into compliance.

9. Quincy's procedural arguments having failed, we now turn to consider the susbtantive arguments raised by Quincy. First, Quincy contends that the Commission's mandatory signal carriage rules are unconstitutional. Quincy argues that these rules violate its 1st Amendment right to exercise discretion over the programming it offers to subscribers and restrict its cable subscribers' right to receive discretionary, non-mandatory signals. In a similar vein, Quincy maintains that the mandatory signal carriage rules abridge its 5th Amendment rights. Quincy argues these rules have not been upheld by the courts, contrary to the Bureau's claim, and that the Court of Appeals and Supreme Court decisions relied upon by the Bureau are not on point.[12] Finally, Quincy contends that the constitutionality of the Commission's cable signal carriage rules has been discredited by *Midwest Video Corp. v. FCC,* 571 F. 2d 1025, 1048 (8th Cir. 1978), and by *Home Box Office, Inc. v. FCC,* 567 F. 2d 9, n. 80 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 829 (1977).

10. We are not persuaded by Quincy's arguments. Contrary to Quincy's assertions, both the Court of Appeals for the Eighth Circuit and the Supreme Court have not only affirmed the Commission's jurisdiction to impose signal carriage restrictions on cable systems but have also affirmed the substantive validity of those regulations. *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968), addressed a similar challenge to the Commission's jurisdiction to promulgate cable television regulations. The Supreme Court found that the Commission had reasonably deter-

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[12] This case law, which the Bureau cited at paragraph 5 of its *Order,* is: *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968); *Black Hills Video Corporation v. FCC,* 399 F. 2d 65 (8th Cir. 1968); *United States v. Midwest Video Corp.,* 406 U.S. 649 (1972); and *Federal Communications Commission v. Midwestern Video Corp., et al.,* 440 U.S. 689 (1979).

mined that cable system signal carriage restrictions were necessary in order for the Commission to discharge its statutory responsibilities under the Communications Act of 1934, as amended, to promote the development of a system of television broadcast stations capable of serving as outlets for local self-expression. 392 U.S. at 173-175. Therefore, the Court held that the Commission had the authority to impose cable regulations that are "reasonably ancillary to the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. While the substantive validity of the Commission's mandatory signal carriage rules under the 1st and 5th Amendments was not before the Supreme Court in *Southwestern*, free expression and eminent domain issues were directly raised in another challenge to the 1966 signal carriage rules which was pending at the time *Southwestern* was decided. In *Black Hills Video Corporation v. FCC*, 399 F. 2d 65, 69-70 (8th Cir. 1968), the Court of Appeals found that the mandatory signal carriage rules were within the scope of the Commission's jurisdiction, as delimited by the Supreme Court in *Southwestern*, and expressly rejected arguments that signal carriage restrictions violate cable operators' 1st and 5th Amendment rights.

11. Furthermore, although the Supreme Court has not specifically addressed challenges to the Commission's mandatory signal carriage regulations since *Southwestern*, the Court has reconfirmed these cable rules on two separate occasions. In *United States v. Midwest Video Corp.* (*"Midwest I"*), 406 U.S. 649 (1972), the Supreme Court examined the Commission's authority to impose cablecasting requirements on cable television systems. In finding that cablecasting requirements were within the "reasonably ancillary" guidelines of *Southwestern*, the Court noted that:

> *Southwestern* reviewed, but did not specifically pass upon the validity of the [signal carriage] regulations.

> See 392 U.S., at 167. Their validity was, however, subsequently and correctly upheld by courts of appeal as within the guidelines of that decision. See, e.g., *Black Hills Video Corp. v. FCC*, 399 F. 2d 65 (8th Cir. 1968).

406 U.S. at n. 17 (1972). Secondly, in *Federal Communications Commission v. Midwestern Video Corporation, et al. ("Midwest II")*, 440 U.S. 689 (1979), *granting cert. to Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), the Court addressed an analogy made by the Commission between the mandatory signal carriage rules at issue in *Southwestern* and the leased access channel question before it. The Court rejected the Commission's argument that the Commission's authority to impose access channel requirements on cable systems was consistent with its authority, upheld in *Southwestern*, to impose mandatory signal carriage regulations. However, in so doing, the Court distinguished the mandatory signal carriage rules and reconfirmed their validity. 440 U.S. at n. 16. In light of the above, we are not persuaded by Quincy's allegation that the Bureau's reliance on these cases was misplaced.

12. Moreover, we are not persuaded by Quincy's claim that the mandatory signal carriage rules have been repudiated by the Court of Appeals' decision in *"Midwest II."* As noted in the paragraph above, the Supreme Court's certiorari decision in *"Midwest II"* subsequently reconfirmed the validity of the Commission's signal carriage rules. Nor are we persuaded by Quincy's claim that *Black Hills'* affirmation of the constitutionality of the mandatory signal carriage rules has been discredited by *Home Box Office, Inc. v. FCC*, 567 F. 2d 9, n. 80 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977). In fact, the Court of Appeals, at note 80 of its decision, rejected *Black Hills* only as authority to support the constitutionality of the Commission's pay cable and cablecasting rules and explicitly distinguished those rules from the Commission's signal car-

riage rules, which it characterized as "constitutionally permissible public control over broadcast signals . . ." 567 F. 2d at 44-45. Therefore, we find that the Bureau's rejection of Quincy's constitutional arguments was substantiated by legal precedent. The Commission itself has previously found precisely the same 1st and 5th Amendment challenges to the mandatory signal carriage rules as raised by Quincy to be unpersuasive. See *Daniels Properties, Inc.* (Nolanville, Texas), FCC 77-557, 65 FCC 2d 653, 655-656 (1977); *Quinebaug Valley Cablevision, Inc.* (Southbridge, Massachusetts), FCC 75-389, 52 FCC 2d 576, 578-579 (1975).

13. Finally, we turn to consider Quincy's contention that it should have been granted a waiver of the mandatory signal carriage rules. In the case before us, each of the Spokane stations is significantly viewed in Grant County, Washington, where Quincy's cable system is located, and therefore they have mandatory carriage rights on Quincy's cable system, upon request, under the provisions of Section 76.57(a)(4) of the Rules. In addition, Station KHQ-TV and Station KXLY-TV are entitled to mandatory carriage pursuant to Section 76.57(a)(2) of the Commission's Rules since their signals are carried by 100-watt translator stations, K83AJ and K77AO, respectively, which serve Quincy, Washington. The licensee of each station at issue has made a formal request for carriage on the Quincy system. Thus, absent a waiver, Quincy is obligated to carry the Spokane stations or in the case of Stations KHQ-TV and KXLY-TV their translator stations. To support its request for waiver of the mandatory signal carriage rules, Quincy must make a compelling showing, with specific factual evidence, that our granting its request would be in the public interest. *Marin Cable Television, Inc.* (Sausalito, California), FCC 76-217, 58 FCC 2d 1085 (1976).

14. We find that Quincy has failed to meet its burden of proof for waiver. Thus, the Bureau correctly determined that Quincy should be required to comply with the Com-

mission's mandatory signal carriage rules. We are not persuaded that a waiver is warranted based solely on Quincy's mere allegations, unsupported by any demonstration of proof, that the technical quality of the Spokane stations is inferior. The measurement procedures used to establish signal quality must either be reliable and precise in accordance with sound engineering practice or follow procedures consistent with the Commission's Rules specified in Section 73.686(c)[13] and the 1959 Television Allocations Study Organization (TASO) report to the Commission.[14] *David A. Adams CATV Cable* (Waymart, Pennsylvania), FCC 78-847, 70 FCC 2d 649 (1979); *Staunton Video Corp.* (Staunton, Virginia), FCC 75-328, 52 FCC 2d 602 (1975). Neither are we persuaded by Quincy's contentions that its obligation to comply with the mandatory signal carriage rules is vitiated because it already carries three network stations on its system, because its subscribers may receive the Spokane translator stations over-the-air on their UHF terminals, or because its subscribers allegedly have no interest in viewing the Spokane signals. We have consistently found that these same arguments are insufficient to overcome the policies of our mandatory signal carriage rules. See, e.g., *Pioneer Cablevision Corp.* (Endicott, New York), FCC 75-40, 50 FCC 2d 821 (1975); *Quinebaug Valley Cablevision, Inc.* (Southbridge, Massachusetts), FCC 74-1113, 49 FCC 2d 283 (1974), *recons. denied*, FCC 75-389, 52 FCC 2d 576 (1975); *Hoosier Telecable Corp.* (Peru, Indiana), FCC 73-1003, 43 FCC 2d 248 (1973).

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[13] Section 73.686(a) states that:

> . . . In instances where a showing of the measured level of a signal prevailing over a specific community is appropriate, the procedure for making and reporting field strength measurements for this purpose is set forth in paragraph (c) of this section.

[14] *Television Allocations Study Organization, Final Report of Committee 4.1 on Measurement of Service Fields*, 280 (1959).

15. A primary objective of the Commission in adopting the mandatory signal carriage rules was to assure that local television stations are carried on cable systems and are allowed access to the audience they are licensed to serve. Paragraph 78, *Cable Television Report and Order,* 36 FCC 2d 143, 173 (1972); *Concord TV Cable* (Concord, California), FCC 75-1342, 58 FCC 2d 1178 (1975). It is for this reason that our signal carriage policy provides that mandatory signals have carriage priority over non-mandatory signals. *MBS Cable TV, Inc.* (Carrollton, Ohio), FCC 76-553, 59 FCC 2d 1181 (1976). Here, Quincy does not dispute the fact that the three Spokane signals are the only signals entitled to mandatory carriage on its system. Nor does Quincy dispute the fact that after deleting two of these mandatory signals, it saturated its channels with non-mandatory signals. Rather, the gravamen of Quincy's objections to resuming carriage of the deleted signals appears to be a complaint that since its channel capacity is now completely occupied, adding the Spokane stations will force it to delete carriage of non-mandatory programming. We find Quincy's objections without merit. The Commission's Rules do not *per se* require Quincy to delete non-mandatory programming in order to carry mandatory signals. Rather, our cases have consistently held that a cable system whose channels are completely occupied may exercise discretion in fulfilling its signal carriage obligations by deleting a non-mandatory signal, by expanding its channel capacity or, where appropriate, by composite carriage. See, e.g., *Cable-Vision, A Division of American Television and Communications Corp.* (Lafayette, California), FCC 77-633, 66 FCC 2d 317 (1977); *Concord TV Cable* (Concord, California), FCC 75-1342, 58 FCC 2d 1178 (1975); *Liberty TV Cable, Inc.* (Novato, California), FCC 75-546, 53 FCC 2d 275 (1975). Moreover, by filing its petition for waiver, Quincy implicitly recognized its obligation under the Commission's Rules to carry the Spokane signals. Hence, it acted at its own risk in saturating its channel capacity

with non-mandatory signals after it deleted the mandatory Spokane signals from carriage. *Quinebaug Valley Cablevision, Inc.* (Southbridge, Massachusetts), FCC 75-389, 52 FCC 576, 578-579 (1975). Thus, we concur with the Cable Television Bureau's finding that Quincy is required to comply with the Commission's mandatory signal carriage rules by reinstating carriage of the mandatory Spokane signals it has deleted from carriage.

16. In light of the foregoing, we reject Quincy's substantive and procedural challenges to the Cable Television Bureau's decision in *Quincy Cable TV, Inc.* (Quincy, Washington), Mimeo No. 002764, released August 18, 1981, and affirm that decision in its entirety. Accordingly, we do not find that a grant of Quincy's petition for review is in the public interest. Finding that denial of the requested waiver was both procedurally and substantively correct, that the constitutional questions raised were not new or novel, and that the waiver denial was neither automatically stayed by virtue of the petitions for reconsideration or review, nor specifically stayed by decision of the Commission, we conclude that Quincy Cable TV, Inc.'s failure to carry the signals of Stations KHQ-TV and KREM following denial of its waiver request represents a clear and continuing violation of Section 76.57 of the Commission's Rules. Quincy Cable TV, Inc., moreover, was specifically placed on notice that continuation of this violation could result in the imposition of a forfeiture. (*Order,* at paragraph 8). Accordingly, having considered the nature of the violation involved, the duration of the violation (from at least September 17, 1981, to the present), and the size of the systems involved, we are directing the Chief, Cable Television Bureau to issue a Notice of Apparent Liability for forfeiture to Quincy Cable TV, Inc. in the amount of $5,000 for its violations of Section 76.57(a) of the Rules.

Accordingly, IT IS ORDERED, That the "Application for Review" (CSR-1678) filed by Quincy Cable TV, Inc.,

on September 17, 1981, IS DENIED.

IT IS FURTHER ORDERED, That the "Application f · Review" filed by Quincy Cable TV, Inc., on October 2, 1981, IS DISMISSED pursuant to note 3, *supra.*

IT IS FURTHER ORDERED, That the "Motion for Stay" filed by Quincy Cable TV, Inc., on September 1981, IS DISMISSED pursuant to note 3, *supra.*

IT IS FURTHER ORDERED, That the Chief, Cable Television Bureau, IS DIRECTED to issue a Notice of Apparent Liability for Forfeiture in the amount of $5,000 to Quincy Cable TV, Inc., for its violations of Section 76.57 (a) of the Commission's mandatory signal carriage rules.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 83-60
32753

QUINCY V

(See dissenting statement of Commissioner Jones)

CSR-1678
WA0295

In re:

QUINCY CABLE TV, INC.
Quincy, Washington

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 1983 Released: February 17, 1983

By the Commission:

Introduction

1. On April 28, 1980, the Chief of the Cable Television Bureau, pursuant to delegated authority, denied a petition for waiver of the cable television mandatory broadcast signal carriage rules (Section 76.57 of the Commission's Rules) filed by Quincy Cable TV, Inc. (hereinafter "Quincy"), of Quincy, Washington.[1] Quincy thereafter did not comply with the rules but filed petitions for stay and for reconsideration,[2] and subsequently for review by the full

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[1] *In re Quincy Cable TV, Inc.* (Quincy, Washington), Cable Television Action Report No. 2409 (released May 2, 1980) [hereinafter *"Quincy I"*].

[2] *See Quincy Cable TV, Inc.* (Quincy, Washington), Mimeo No. 002764, 50 RR 2d 62 (1981) [hereinafter *"Quincy II"*]; *In re*

Commission. The Commission affirmed the decisions of the Bureau Chief and directed issuance of a Notice of Apparent Liability to Quincy in the amount of $5,000 for failure to carry the signals in question, stating that the filing of stay, reconsideration, and waiver petitions does not automatically stay the effect of a decision taken under delegated authority.[3]

2. Now pending are a series of pleadings relating to this, including: (1) letters dated May 14, 1982, and May 25, 1982, to Chairman Fowler;[4] (2) Quincy's "Petition for Reconsideration"; and (3) oppositions from KHQ, Incorporated (hereinafter "KHQ-TV"); from King Broadcasting Company (hereinafter "KREM-TV"); and from Spokane Television, Inc. (hereinafter "KXLY-TV"), who are, respectively, the licensees of Stations KHQ-TV (NBC, Channel 6), KREM-TV (CBS, Channel 2), and KXLY-TV (ABC, Channel 4), all Spokane, Washington; and (4) Quincy's reply thereto.

3. Although Quincy reiterates and continues certain arguments concerning the validity of the mandatory signal carriage rules themselves,[5] and relating to the denial of its

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Quincy Cable TV, Inc. (Quincy, Washington) (adopted September 2, 1981) [hereinafter *"Quincy III"*].

[3] *Quincy Cable TV, Inc.* (Quincy, Washington), FCC 82-193, 89 FCC 2d 1128 (1982) [hereinafter *"Quincy IV"*].

[4] KREM-TV and KXLY-TV each filed a "Motion to Strike" Quincy's May 14, 1982, letter on, respectively, May 17 and May 18, 1982. These motions will be denied. While arguably irregular, we cannot say that the filing of Quincy's May 1982 letters has prejudiced any party to this proceeding.

[5] In a "Motion for Expedited Determination" filed July 8, 1982, Quincy raises an additional constitutional challenge to the mandatory signal carriage rules, claiming that they constitute an unlawful taking of private property in contravention of the fifth amend-

waiver petition, Quincy is now essentially seeking reconsideration of that part of the decision relating to its apparent liability for failure to carry the signals in question after initial denial of its petition. Although the Notice of Apparent Liability referred to KHQ-TV and KREM-TV, it and the *Quincy II* decision should have referred to KHQ-TV and KXLY-TV, both of which Quincy admitted to not carrying. Although it might be inferred that KREM-TV was also not carried, this is not in evidence. Quincy has not argued that this provides any ground for change in the forfeiture proposed, and we do not believe any change is in order since the forfeiture was not based on the particular identity of the signals involved. The essential question here is whether the effectiveness of the Bureau Chief's decision was stayed by the filing of various subsequent pleadings so that no violation could be said to have occurred.

Summary of Pleadings

4. Prior to filing of the instant reconsideration petition, Quincy filed a letter to the Chairman of the Commission on May 14, 1982.[6] In this letter, Quincy contends that the language of Section 76.7(g) of the Rules, which allows a timely filing of, *inter alia*, a petition for waiver of Section 76.57(a) of the Rules to toll the requirements of that rule

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ment, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164 (1982). We note, however, that the Court continues to distinguish between permanent physical occupations of property, which constitute takings, and ". . . appropriate restrictions upon an owner's *use* of his property," *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. at 3179, which do not. *See also Black Hills Video Corporation v. FCC*, 399 F.2d 65 (8th Cir. 1968).

[6] The letter was served on all Commissioners; the General Counsel; the Chief of the Cable Television Bureau; and counsels for KHQ-TV, KREM-TV, and KXLY-TV.

". . . pending the Commission's ruling on the petition or on the question of temporary relief pending further proceedings," clearly demonstrates that Quincy's progressive filings for stay pending further review have continuously tolled Quincy's obligations to carry the Spokane signals. Quincy asserts that any finding that it has been in violation of Section 76.57(a) of the Rules as early as May 2, 1980, renders Section 76.7(g) of the Rules a nullity. Quincy reiterates its contention that Section 408 of the Communications Act prohibited the Bureau Chief from imposing a ten-day compliance requirement on Quincy in *Quincy II*. Quincy claims that the questions it has raised in these proceedings have been novel, and should not have been decided on delegated authority. Quincy argues that it should not be subject to forfeiture liability in the face of Bureau and Commission silence on Quincy's stay requests. Citing Section 1.108 of the Rules, Quincy suggests that the Commission might on its own motion set aside *Quincy IV*.[7]

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[7] Quincy commented on KREM-TV's and KXLY-TV's motions to strike its letter on May 20, 1982, contending that its letter was procedurally proper. Quincy claims that its letter only addressed the question of the $5,000 forfeiture, which Quincy characterizes as inequitable and unwarranted. Quincy argues that while former Section 74.1109(h) of the Rules referred to "interlocutory" questions of temporary relief pending further "procedurces," the fact that its successor Section 76.7(g) of the Rules did not use the term "interlocutory" and uses the term "proceedings" means that Section 76.7(g) of the Rules allows for stays of signal carriage obligations at least until a final decision subject to judicial review is handed down by the Commission. KREM-TV and KXLY-TV each replied to Quincy's comments on, respectively, May 21, and May 25, 1982. Both KREM-TV and KXLY-TV state that the proper procedure for requesting mitigation or remission of a forfeiture is set forth in Section 1.80(f)(3) of the Rules. On June 11, 1982, Quincy responded to the notice of apparent liability, requesting that action on the notice be held in abeyance pending Commission action on the instant "Petition for Reconsideration." However,

5. On May 25, 1982, Quincy filed another letter to the Chairman. In this letter, Quincy contends that its argument that it is not obligated to carry the Spokane signals is supported by the Administrative Procedure Act (hereinafter "APA"), particularly Sections 551(8), 551(9), and 558(c) of the APA, referring to agency licensing procedures, which Quincy asserts include the Commission's signal registration and carriage rules for cable television systems. Quincy claims that, pursuant to Section 558(c) of the APA, the automatic stay provisions of Section 76.7(g) of the Rules, triggered by Quincy on November 27, 1979, may not be terminated until the Commission issues its final determination in this proceeding.

6. In support of its "Petition for Reconsideration," filed June 4, 1982, Quincy reiterates its prior arguments concerning the automatic stay provisions of Section 76.7(g) of the Rules, Section 408 of the Communications Act, and Sections 551 and 558 of the APA.[8] Quincy further argues that Sections 551(6) and 558(b) of the APA preclude treating *Quincy II* as a final or an effective order. In addition, Quincy now contends that none of the Spokane stations can assert mandatory carriage rights on Quincy's system. Section 76.57 of the Rules permits such rights to be asserted by a ". . . relevant licensee . . . ." According to Quincy, this does not include the Spokane licensees, whose signals, Quincy claims, neither serve nor reach Quincy, Washington. Quincy asserts that the only over-the-air service available to its community is from the translators which rebroadcast the Spokane signals. These translators are

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upon examination of the thrust of Quincy's arguments on reconsideration, we will herein address the question of Quincy's forfeiture liability, rather than postpone consideration thereof as Quincy requests. *See* Section 1.80(f)(3) of the Rules.

[8] Quincy also argues that the automatic stay represents an "exemption" within the meaning of Section 551(8) of the APA.

licensed to Quincy Valley TV Inc. (hereinafter "Quincy Valley"), which has never requested carriage of its signals. Quincy further argues that Section 312 of the Communications Act requires certain procedures before the Commission may find violation of a rule or regulation, which were not afforded prior to the issuance of *Quincy II* or *Quincy IV*. Quincy challenges the summary disposition of its argument concerning Section 408 of the Communications Act in *Quincy IV* at n. 11, and maintains that the ten-day compliance order of *Quincy II* ". . . is illegal and of no effect."

7. KHQ-TV filed its opposition on June 17, 1982. Initially, KHQ-TV argues that Quincy's petition is procedurally defective, as it alleges no new facts or changed circumstances concerning the signal carriage at issue, and is more properly directed to the notice of apparent liability insofar as it challenges the forfeiture authorized in *Quincy IV*. KHQ-TV contends that Sections 1.102(b)(1), 1.102(b)(3), and 1.115(h)(2) of the Rules clearly indicate that issuance of a stay of an action taken by delegated authority is discretionary on the part of the Commission, and that the Commission in its discretion herein decided not to issue a stay. Accordingly, maintains KHQ-TV, Quincy was obligated to comply with the order of *Quincy II*. KHQ-TV further contends that at this date, Quincy's argument based on Section 408 of the Communications Act has become moot by the passage of time.[9] With regard to Quincy's argument concerning the automatic stay, KHQ-TV argues that were this argument to be accepted, "it would jeopardize the Commission's entire temporary authorization and waiver granting process." In any event, asserts KHQ-TV, *Quincy II* denied any continuance of temporary relief, terminating the automatic stay. KHQ-TV maintains that its status as a significantly viewed signal in Grant County makes it a

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[9] KHQ-TV notes that Quincy apparently resumed carriage of KHQ-TV on June 3, 1982. *See also* note 10, *infra*.

relevant licensee to assert carriage rights, pursuant to Section 76.57(a)(4) of the Rules, as the Commission noted in *Quincy IV* at 1128-1129 n. 1.

8. KREM-TV opposed Quincy's petition on June 17, 1982. KREM-TV notes that it is entitled to be carried on Quincy's system, pursuant to Section 76.57(a)(4) of the Rules. In addition, citing *Friendly Broadcasting Co.* (Cleveland Heights, Ohio), FCC 62-670, 23 RR 2d 893, 897 (1962), KREM-TV contends that the Commission's forfeiture sanctions are separate and distinct from those authorized by Section 312 of the Communications Act. KREM-TV argues that the Commission's forfeiture sanctions are authorized by Sections 501 and 503 of the Communications Act and Section 558(b) of the APA, and characterizes the automatic stay provisions of Section 76.7(g) of the Rules not as a "license" but as "relief" within the meaning of Section 551(11)(c) of the APA. Finally, KREM-TV notes that Quincy was not assessed a forfeiture until after it had been given a chance to comply with *Quincy II* and failed to do so.

9. KXLY-TV opposed Quincy's petition on June 17, 1982. KXLY-TV again argues that Quincy's May 14, 1982 letter should be stricken, as should Quincy's May 25, 1982 letter. KXLY-TV characterizes Quincy's "Petition for Reconsideration" as repetitive, and ". . . limited to . . . strained legalistic contentions. . . ." KXLY-TV asserts that Quincy has misrepresented facts concerning its signal complement from the inception of this proceeding, in the face of which the $5,000 forfeiture imposed is justified. KXLY-TV states that it is the relevant licensee and party-in-interest to request carriage as the Quincy Valley translators rebroadcast the Spokane signals only with their consent. Finally, KXLY-TV contends that Section 312 of the Communications Act is not applicable to Quincy because it is not a broadcast licensee.

10. Quincy filed its "Reply to Oppositions" on June 23, 1982. Quincy claims that neither Commission nor Bureau orders are self-effectuating, even on thirty days' notice, and reiterates its first amendment arguments. In addition, Quincy asserts that, pursuant to Section 704 of the APA, *Quincy II* was inoperative pending review by the Commission, or was subject immediately to judicial review. Absent these safeguards, Quincy maintains, first amendment rights and freedoms would be intolerably deferred. Quincy reiterates its prior arguments challenging the Commission's application of Section 1.102 of the Rules, by which the Commission in *Quincy IV* found *Quincy II* to have been final and effective on release, and contends that Section 1.102 of the Rules is in conflict with Section 408 of the Communications Act.[10]

Discussion

11. To avoid controversy, and to expedite and narrow the issues in this proceeding, the Notice of Apparent Liability was issued only for rule violations commencing on or after May 18, 1981. In the Bureau Chief's *Quincy II* decision, Quincy was ordered to resume carriage of the signals in question within ten days; *i.e.*, by August 28, 1981. Quincy now argues that this order should not have been issued without the type of hearing described in Section 312(c) of

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[10] On July 8, 1982, Quincy filed a "Motion for Expedited Determination." Quincy initially states that it has complied with *Quincy IV*, having ". . . commenced carriage of those Spokane, Washington broadcast station signals, via translators, to the preclusion of other programming of its choice, on June 3, 1982." Quincy again contends that *Quincy II* was not a final nor effective decision, citing, *inter alia*, S. Rep. No. 576, 87th Cong., 1st Sess. 7 (1961), and Sections 5(d)(3) and 5(d)(4) of the Communications Act.

the Communications Act[11] first having been held, and also that, pursuant to Section 408 of the Communications Act,[12] no order should have specified an effective date less than 30 days from service of it on Quincy. Since the forfeiture notice issued was for violation of the rules and not an *Order* of the Commission and since it was for violations continuing more than 30 days after service of the *Memorandum Opinion and Order* denying Quincy's waiver request *(Quincy I)*, a resolution of both of these arguments in favor of Quincy would not result in any change in the outcome of this proceeding. We need not therefore address in detail Quincy's arguments. We would note, however, that Congress recently amended Section 408 to provide explicit authority for the Commission to make orders effective on less than 30 days' public notice. *See* H. R. Rep. No. 97-765, 97th Cong., 2d Sess. 58 (1982).[13]

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[11] Section 312(c) of the Communications Act states, in pertinent part:

> Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee, or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee, or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein.

[12] Section 408 of the Communications Act states, in pertinent part: "Except as otherwise provided in this Act, all orders of the Commission, other than orders for the payment of money, shall take effect with such reasonable time, not less than thirty days after serivce of the order. . . ."

[13] We note, with respect to Quincy's arguments concerning Sec-

12. The second argument raised relates to compliance with the requirements of the APA. Section 558(c) of the APA specifies that if a proper application for a new license or for renewal of a license is on file, the existing license "does not expire until the application has finally been determined by the agency." This provision is urged to be relevant in the present context because "license" is a defined term in Section 551(8) of the APA, which includes "statutory exemption or other form of permission." If the exemption from the mandatory signal carriage rules provided Quincy during the pendency of its waiver application is an APA "license" then arguably that license continues in force past the time of the Bureau Chief's decision until the matter is finally determined by the agency. If this were the case, no rule violation could be said to have occurred. However, Section 551(8) of the APA, in defining the term "license," does not refer to exemptions in general, but only to "statutory exemption[s]" as well as other traditionally understood forms of "permission" or "registration." A request such as Quincy's *not* to carry signals required by law is not included in this definition. It is Section 551(11) of the APA which refers to "exemption[s]," as well as other actions beneficial to persons upon application therefor, defining such actions and exemptions

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tion 312 of the Communications Act, that this section is manifestly not meant to circumscribe forfeiture proceedings instituted pursuant to Section 503 of the Communications Act, which are of a separate and distinct nature. *American Cable Television, Inc.* (Fountain Hills, Arizona), FCC 81-555, 88 FCC 2d 593, 604 (1981); *Star Stations of Indiana, Inc., et al.*, FCC 71-365, 28 FCC 2d 691, 692 (1971); *Friendly Broadcasting Co.*, 23 RR 2d at 897. *Cf. Midwest Television, Inc. (KFMB-TV), et al.*, FCC 66-683, 4 FCC 2d 612, 622-623 (1966) (Section 312 does not circumscribe temporary relief provisions of waiver rules).

as "relief," apart from the APA's concept of licenses and licensing procedures.[14]

13. A third argument made is that specific provisions of the Commission's Rules provide Quincy with protection from having to comply with the mandatory carriage rules until such time as the administrative processes relating to its waiver petition are complete. Section 76.7(g) of the Rules provides that if a waiver petition is timely filed, a cable system "need not carry the signal of the requesting station pending the Commission's Ruling on the petition or on the question of temporary relief pending further proceedings." Quincy interprets this to mean that, so long as a request for stay or a petition of some type remains pending, compliance is automatically excused.

14. This is a misinterpretation of the import of Section 76.7(g) of the Rules. This rule had its genesis in former Section 74.1109(h) of the Rules, which allowed the timely filing of an appropriate petition for waiver to stay a carriage requirement "... pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures." The further procedures referred to, however, were only those supplementary to the standard written submissions at the inception of a waiver proceeding, in those few cases in which written submissions alone were insufficient to resolve the pending matter. *Second Report and Order in Docket Nos. 14895, 15233, and 15971,* FCC 66-220, 2 FCC 2d 725, 764-766 (1966). *See also Memorandum Opinion and Order in Docket No. 15971,* FCC 66-354, 3 FCC 2d 400, 401-402 (1966). This is echoed in the current rules, in Section 76.7(f) of the Rules, which states in pertinent part: "In the event that an evidentiary hear-

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[14] Moreover, we note that Section 558(c) of the APA specifically refers to ". . . a license required by law," which does not contemplate a request *not* to carry signals otherwise required by rule or law.

ing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be afforded any party *pending the hearing* and the nature of any such temporary relief." (emphasis added). In proceedings involving questions of television broadcast signal carriage, however, the evidentiary hearings required by the 1966 cable television rules were found to be unnecessarily burdensome, and were eliminated in 1968. *Cable Television Report and Order*, FCC 72-108, 36 FCC 2d 143, 148 (1972); *Notice of Proposed Rulemaking and Notice of Inquiry in Docket No. 18397*, FCC 68-1176, 15 FCC 2d 417, 432-434 (1968). Nevertheless, the Commission stated that it had ". . . retained special relief rules," *Cable Television Report and Order*, 36 FCC 2d at 186, in this instance Section 76.7(g) of the Rules, allowing for an automatic stay of carriage requirements ". . . pending the Commission's ruling on the petition or on the question of temporary relief pending further proceedings." The actual change in language was, apart from conforming editorial changes to new rule numbers, to delete the word "interlocutory" from the rule, and to substitute the word "proceedings" for "procedures." However, we do not agree that successive filings of requests for stay will prolong indefinitely the automatic stay of Section 76.7(g) of the Rules. Such an effect was not contemplated nor intended by former Sections 74.1109(f) and 74.1109(h) of the Rules. Indeed, in view of the Commission's desire to avoid burdensome special relief proceedings, we do not read Section 76.7(g) as allowing an automatic stay beyond the time that the Commission (or its designated authority) acts on an initial petition for relief. Accordingly, while Quincy's timely filed petition for waiver in 1979 stayed Quincy's carriage obligations vis-a-vis the affected stations, this automatic stay expired upon the resolution of *Quincy I*.

15. While Quincy argues that Section 704 of the APA either rendered the Bureau Chief's decisions in *Quincy I* and *Quincy II* inoperative pending review by the full Com-

mission, or subjected them immediately to judicial review, we disagree. Section 704 of the APA states, in pertinent part:

> Except as otherwise expressly required by statute, agency action otherwise final is final *for the purposes of this section* whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration or, unless the agency otherwise requires by rule *and* provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. § 704 (1977) (emphasis added). While Section 5 (d)(7) of the Communications Act and Section 1.115(k) of the Rules make the filing of an application for review a condition precedent to judicial review of delegated actions, neither Sections 5(d)(3) nor 5(d)(4) of the Communications Act grants an automatic stay on such a filing. In fact, Section 1.102(b) of the Rules states that stays of delegated actions are discretionary.[15] Nor do we feel that our existing procedures for rehearing constitute either a prior restraint or an intolerable deferral of access to review in contravention of the first amendment, which would be impermissible under, *e.g.*, *Freedman v. Maryland*, 380 U.S. 51 (1965); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); and *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).[16] Finally, nothing in

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[15] *See also* Section 705 of the APA, Section 405 of the Communications Act, and Section 1.106(n) of the Rules, setting forth the discretionary nature of stays on the part of an agency.

[16] With regard to Quincy's contention that Sections 551(6) and 558(b) of the APA preclude treating *Quincy II* as an effective or final order, we do not read the APA so rigidly, nor have the courts. *See, e.g., FTC v. Standard Oil Co. of California*, 101 S. Ct. 488, 493 (1980). *Cf. Bucks County Cable TV, Inc. U.S.*, 299 F. Supp.

Quincy's numerous arguments gives us any justification for a mitigation of the $5,000 dollar forfeiture.[17]

In view of the foregoing, we find that grant of Quincy's petition is not in the public interest.

Accordingly, IT IS ORDERED, That the "Motion to Strike" filed May 17, 1982, by King Broadcasting Company IS DENIED.

IT IS FURTHER ORDERED, That the "Motion to Strike" filed May 18, 1982, by Spokane Television, Inc. IS DENIED.

IT IS FURTHER ORDERED, That the "Petition for Reconsideration" filed June 4, 1982, by Quincy Cable TV, Inc. IS DENIED.

IT IS FURTHER ORDERED, pursuant to Section 503 (b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, That Quincy Cable TV, Inc. FORFEIT to the United States the sum of five thousand dollars ($5,000) for willful or repeated violation of Section 76.57(a) of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Federal Communications Commission. If this forfeiture is not paid within thirty (30) days of the release date of this Memorandum Opinion and Order, the case will be referred to the Department of Justice for collection,

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1325, 1334 (E.D. Pa. 1969), *rev'd on other grounds,* 427 F. 2d 438 (3d. Cir. 1970), *cert. denied,* 400 U.S. 831 (1970) (automatic stay constitutes final action).

[17] We also note an erroneous reference to an obligation on Quincy's part to carry the signal of Station KALB-TV (NBC, Channel 5), Alexandria, Louisiana, in *Quincy II* at 66. This was an editorial error, and is rescinded.

pursuant to Section 504(a) of the Communications Act of 1934, as amended.

IT IS FURTHER ORDERED, That a copy of this Memorandum Opinion and Order shall be sent by Certified Mail—Return Receipt Requested to Quincy Cable TV, Inc.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

32880

CSR-1678
WA0295

In re:

QUINCY CABLE TV, INC.
Quincy, Washington

Petition for Reconsideration

ERRATUM

Released: February 23, 1983

The Memorandum Opinion and Order (FCC 83-60) in the above entitled matter, released February 17, 1983, is corrected to read after the phrase "By the Commission:" Commissioner Jones dissenting and issuing a statement.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

Statement of Commissioner Jones attached.

February 18, 1983

Dissenting Statement of
Commissioner Anne P. Jones

In Re: Petition for Reconsideration filed June 4, 1982, by Quincy Cable TV, Inc.

When this case first came before the Commission on April 22, 1982, I reluctantly concurred in affirmance of the Bureau Chief's denial of the relief requested by Quincy Cable. On reconsideration, I have concluded that Quincy should be granted that relief.

In the maze of arguments and counterarguments adduced in this matter it is easy to lose sight of the essential issue: who is to decide what programming this small cable system in this small town in central Washington shall provide its customers? In my view that decision should as a matter of policy, and perhaps must as a matter of law, rest with Quincy Cable.

Our "must carry" rules are intended to ensure that signals locally available over the air are not lost to customers who subscribe to a cable service and disconnect their antennas. That such customers could retain access to local signals by availing themselves of a switch or simply disconnecting the cable and reconnecting their antennas at any time may be put to one side. The important point in this case is that none of the signals in question appears to be "local", except perhaps in a Pickwickian sense. The choice is between signals imported either from Seattle or Spokane, with Seattle about 130 miles distant to the west and Spokane about equally distant to the east. There is no suggest that any of the stations target any of their programming to Quincy.

Quincy Cable insists that it is constitutionally entitled to use its limited channels to provide its customers with

programming of its and their choice brought in from Seattle and elsewhere. I believe it may be correct.

In its April 22, 1982, Memorandum Opinion and Order, the Commission answered Quincy Cable's constitutional arguments in part by asserting that in foootnote 16 to its decision in *Midwest Video II* the U.S. Supreme Court "distinguished the mandatory signal carriage rule [from the access rules in question in that case] and reconfirmed their validity." 89 F.C.C. 2d 1135. It seems to me, though, that read in context, that footnote does nothing more than distinguish these rules.

If we are to infer law from footnotes, I believe that for purposes of the present case footnote 19, in *Midwest Video II* is more significant than footnote 16. In footnote 19, the Supreme Court noted the opinion by Chief Judge Markey for the U.S. Court of Appeals for the Eighth Circuit in that case and said:

> "The Court below suggested that the Commission's rules might violate the First Amendment rights of cable operators. Because our decision rests on statutory grounds, we express no view on that question, save to acknowledge that it is not frivolous and to make clear that the asserted constitutional issue did not determine or sharply influence our construction of the statute. The Court of Appeals intimated, additionally, that the rules might effect an unconstitutional "taking" of property or, by exposing a cable operator to possible criminal prosecution for offensive cablecasting by access users over which the operator has no control, might affront the Due Process Clause of the Fifth Amendment. We forego comment on these issues as well." 440 U.S. 709

Footnote 19 seems a virtual invitation by the court for a proper case in which to consider the constitutional arguments pressed so insistently by Quincy Cable in this one.

Since I believe the Commission's disposition of this case is wrong as a matter of policy, and even plain common sense, I find it unfortunate that Quincy Cable must either accede to that disposition or incur the expense of seeking review by the courts. If, however, it does seek review, I believe it may ultimately succeed in convincing the reviewing court that the regulation here in question is without rational justification and/or unconstitutional.

I therefore respectfully dissent.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 84-425
34974

CSR-1678
WA0295

In re:

QUINCY CABLE TV, INC.
Quincy, Washington

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: September 13, 1984 Released: September 20, 1984

By the Commission: Commissioners Rivera and Patrick absent.

Introduction

1. This proceeding, involving Quincy Cable TV, Inc. (hereinafter "Quincy"), operator of a cable television system serving Quincy, Washington, is now before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit, pursuant to the court's decision in *Quincy Cable TV, Inc. v. FCC,* 730 F.2d 1549 (D.C. Cir. 1984) (*per curiam*). The remand was ordered to enable the Commission "to consider Quincy Cable's claims in light of the current facts," *id. at* 1551; specifically, the expansion by Quincy of its cable system to 32-channel capacity, arranged in various tiers.

2. On November 27, 1979, Quincy requested a waiver of Section 76.57 of the Commission's Rules,[1] to delete Stations KREM-TV (CBS, Channel 2), KXLY-TV (ABC, Channel 4), and KHQ-TV (NBC, Channel 6) all Spokane, Washington, from its cable system.[2] Quincy argued that these signals could be received over-the-air without cable so that carriage was unnecessary, and that the channels occupied by these signals were needed to carry alternative programming not otherwise carried on the system. This petition was denied by the Chief of the Cable Television Bureau. *Quincy Cable TV, Inc.* (Quincy, Washington), Cable Television Action Report No. 2409 (released May 2, 1980) [hereinafter "Quincy I"]. Quincy thereafter did not comply with the rules, but file instead petitions for stay and for reconsideration,[3] and subsequently for review by the full Commission.

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[1] Quincy's signal carriage obligations are now determined by Section 76.59 of the Rules, due to the licensing of Television Broadcast Station KCWT (Ind., Channel 27), Wenatchee, Washington. While stations seeking to invoke the mandatory carriage provisions of our Rules would now predicate such requests upon Section 76.59 rather than Section 76.57 of the Rules, this change has not altered the factual bases entitling the Spokane stations to carriage on Quincy's cable system.

[2] Stations KHQ-TV, KXLY-TV and KREM-TV are entitled to mandatory carriage on the Quincy cable system, pursuant to Section 76.59(a)(6) of the Commission's Rules, since they are significantly viewed in Grant County, Washington, the county in which Quincy's cable system is located. Alternatively, KHQ-TV and KXLY-TV are also entitled to mandatory carriage, pursuant to Section 76.59(a)(5) of the Commission's Rules. since their signals are carried by 100-watt translator stations, K83AJ and K77AO, respectively, which serve the community of Quincy, Washington. *See* Section 76.55(c) of the Commission's Rules.

[3] *See Quincy Cable TV, Inc.* (Quincy, Washington), Mimeo No. 002764, 50 RR 2d 62 (1981) [hereinafter *"Quincy II"*]; *Quincy Cable TV, Inc.* (Quincy, Washington) (adopted September 2, 1981) [*"Quincy III"*].

The Commission affirmed the decisions of the Bureau Chief, however, and directed issuance of a Notice of Apparent Liability to Quincy in the amount of $5,000 for failure to carry the signals in question, stating that the filing of stay, reconsideration, and waiver does not automatically stay the effect of a decision made pursuant to delegated authority. *Quincy Cable TV, Inc.* (Quincy, Washington), 89 FCC 2d 1128 (1982) [hereinafter *"Quincy IV"*].[4] Subsequently, the Commission denied Quincy's request for reconsideration and for mitigation of the forfeiture, rejecting Quincy's statutory and constitutional challenges to the enforcement of the Bureau Chief's decision. *Quincy Cable TV, Inc.* (Quincy, Washington), 93 FCC 2d 412 (1983) [*"Quincy V"*]. Quincy thereupon petitioned for judicial review.

3. Although Quincy had consistently maintained throughout these proceedings that it possessed merely 12-channel capacity, prior to oral argument new facts concerning Quincy's channel capacity came to light, revealing that Quincy had expanded its channel capacity to 32 channels. This led to the remand of the instant proceeding. *Quincy Cable TV, Inc. v. FCC, supra.* On April 11, 1984, the Chief of the Mass Media Bureau, pursuant to the court's remand and to Sections 1.65 and 76.7 of the Rules, ordered Quincy to supplement its filings in this proceeding within twenty days, and afforded opposing parties ten days within which to respond. Following a request for extension of time, Quincy filed its supplement on May 14, 1984. KREM-TV, KHQ-TV, and KXLY-TV have responded.

Summary of Pleadings

4. Quincy, in its supplement, notes that it commenced operations in August 1978 with 12 channels, and subsequently expanded to 24 channels in June 1982; it further expanded to 32-channel capacity in January 1983, 27 of

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[4] Following this decision, Quincy resumed carriage of the Spokane licensees on June 3, 1982, on its basic tier.

which channels are presently utilized.[5] These channels are offered to Quincy's subscribers in six tiers as follows:

Tier	*Number of Channels*	*Subscribers*	*Monthly Charge*
I (Basic)	12[6]	972	$10.95
II	11[7]	192	$ 5.95
III	1 (Home Box Office)	361	$10.95[8]
IV	1 (Cinemax)	172	$10.95[8]
V	1 (The Disney Channel)	119	$10.95[8]
VI	1 (Galavision)	78	$ 7.00

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[5] Quincy states that it would cost the system $6,000 per channel to add additional satellite-delivered services to its program offerings. The 1982 and 1983 expansions cost the system "approximately $250,000."

[6] In addition to Stations KREM-TV, KXLY-TV, KHQ-TV, and KCWT, this tier also includes: Stations KOMO-TV (ABC, Channel 4), KING-TV (NBC, Channel 5), and KIRO-TV (CBS, Channel 7), all Seattle, Washington; KSPS-TV (ETV, Channel 7), Spokane, Washington; WTBS (Ind., Channel 17), Atlanta, Georgia; WOR-TV (Ind., Channel 9), Secaucus, New Jersey; WGN-TV (Ind., Channel 9), Chicago, Illinois; and The Weather Channel. All of these additional services are discretionary.

[7] This tier includes: Station KAYU-TV (Ind., Channel 28), Spokane, Washington; Cable News Network (CNN); local origination; C-SPAN; USA Network; Music Television (MTV); Spanish International Network; CNN Headline News; Entertainment and Sports Programming Network (ESPN); Lifetime; and the Nashville Network. All of these services are discretionary.

[8] For tiers III, IV, and V, subscribers pay $10.95 for the first such service, $8.95 for the second, and $7.95 for the third.

In addition, Quincy submits what it describes as unsolicited subscriber complaint letters received in April and May 1984, and Quincy's responses to these letters.[9] Quincy contends that, prior to the Commission's denial of Quincy's waiver requests, the system "experienced virtually no subscriber complaints relating to its service offerings." Quincy states that it wishes to place the three Spokane network affiliates on tier II, and replace them on tier I with the more popular CNN and ESPN, formerly carried on that tier, and with a local origination and advertising channel. Some limited local expression is carried currently on the Weather Channel, Quincy avers, and the system does not originate any commercial advertising. Quincy argues that such a tiering arrangement would better serve the public interest than its present scheme does, and would attract a number of lost subscribers.[10] Quincy claims that it is motivated by its subscribers' preferences—particularly those of its senior subscribers who enjoy popular reruns and old movies—which are not met by the Commission's signal carriage rules.

5. KREM-TV, in its response filed May 24, 1984, argues that Quincy seeks to avoid its signal carriage obligations, and "to tier the Spokane signals in order to maximize its profits." This goal, however desirable, is not constitutionally protected, contends KREM-TV, particularly in view of Quincy's increased channel capacity.

6. KHQ-TV responded to Quincy on May 24, 1984, contending that Quincy's arguments are "nothing other than . . . marketing whims and desires . . . ." Unlike the Spokane

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[9] Quincy submitted an additional subscriber complaint letter in a further supplement on May 21, 1984.

[10] Quincy states that the prior Commission orders have caused Quincy's basic subscribership to drop from 1,018 to 972, whereas modification of the system's tiered offerings as proposed would cause its subscribership to rise to about 1,200 by January 1985. *But see* note 16, *infra*.

network affiliates, which are broadcast locally by television translator stations, notes KHQ-TV, the Seattle affiliates, which Quincy prefers not to relocate to a different tier, are not locally available off-air, but are imported by Quincy by its own choice.

7. KXLY-TV opposed Quincy's supplement on May 29, 1984. KXLY-TV argues that Quincy's expansion of its channel capacity has rendered moot the factual basis upon which the system had originally sought special relief, irrespective of Quincy's tiering choices and desires. KXLY-TV contends that Quincy has offered no factual evidence to demonstrate that a waiver of the mandatory signal carriage rules would be in the public interest.

Discussion

8. If Quincy had abided by the representations made in its initial special relief request (that it would carry the signals of KREM-TV, KXLY-TV, and KHQ-TV, at such time as it had the channel capacity to do so), the special relief aspects of this proceeding would now be moot. However, the forfeiture imposed has not been paid and Quincy now continues to press for an exemption from the requirements of the rules. We are not, therefore, in a position to conclude that the controversy has been terminated. In addition, since all of the additional information now on the record goes toward weakening the initial grounds urged for waiver, no reason is presented that would justify any change in the initial decision. In neither its present pleadings nor in its earlier submissions has Quincy demonstrated by the substantial proof required for grant of a waiver that its request would be consistent with the substantial governmental interests underlying our signal carriage rules as recognized by the Supreme Court.[11] Quincy's request continues to be

[11] *Capital Cities Cable, Inc. v. Crisp*, 52 U.S.L.W. 4803, 4809 (1984); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

devoid of concrete evidence showing that grant of a waiver would be consistent with our policies regarding mandatory carriage of significantly viewed signals, and of translator stations serving the community.

9. Quincy's supplemental filings reveal that the system today, even more than before, possesses the capacity to accommodate KREM-TV, KHQ-TV, and KXLY-TV. That Quincy chooses or desires to tier its service and program offerings in one manner or another is principally a matter within the operator's discretion.[12] However, this does not diminish the right of a significantly viewed station to maintain access to its audience through cable carriage, on a cable system's basic tier of service. *Id.* In addition, it is the Spokane network affiliates, whose programming is broadcast locally via translator stations, which also serve Quincy, Washington.[13] The Seattle stations are available in

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[12] The degree of this discretion has been discussed in other proceedings. *See, e.g., Monterey Peninsula TV Cable* (Salinas, California), 56 RR 2d 159 (1984), *appeal docketed sub nom. Sainte Broadcasting Corp. v. FCC,* No. 84-1209 (D.C. Cir. May 31, 1984); *Community Cable TV, Inc.,* —— FCC 2d —— (1984), *appeal docketed sub nom. National League of Cities v. FCC,* No. 84-1349 (D.C. Cir. July 26, 1984, *appeal docketed sub nom. Public Service Commission of Nevada v. FCC,* No. 84-1350 (D.C. Cir. July 26, 1984), *appeal docketed sub nom. Cable Television Information Center v. FCC,* No. 84-1437 (D.C. Cir. Aug. 23, 1984).

[13] We have previously recognized that translator stations serve the public interest by expanding television service to underserved areas. *See, e.g., Second Report and Order in Docket Nos. 14895, 15233, and 15971,* 2 FCC 2d 725, 757-758 (1966); *Report and Order in Docket No. 15858,* 1 FCC 2d 15 (1965). In fact, on request, translators of 100 watts or higher power are entitled to mandatory carriage on local cable systems. *See, e.g.,* Section 76.59 (a)(5) of the Commission's Rules; *Report and Order in BC Docket No. 78-253,* 51 RR 2d 476, 521 n. 81 (1982); *Cable Television Report and Order,* 36 FCC 2d at 174 n. 42; *Docket Nos.*

the area only because Quincy has chosen to import their programming by microwave.

10. The remainder of Quincy's arguments are equally unpersuasive. Quincy argues that its 24-hour Weather Channel on Tier 1 is necessary as a limited outlet for local expression and origination. However, prior submissions by Quincy reveal that this service replaced a full local origination channel in 1982.[14] This is, in fact, as revealed by Quincy's current submissions, one of several tiering rearrangements and program substitutions performed by Quincy, many of which occurred prior to the return of the Spokane affiliates to Quincy's system. Indeed, Quincy could have avoided much of its program lineup disruptions had it not deleted the Spokane stations in the first instance, and abided by our rules. We note, too, that Quincy previously has stated that it intended to carry these stations once the system expanded its channel capacity.[15] In view of the history, we cannot say that the voluntary decision by certain of Quincy's subscribers to discontinue their subscriptions is due to any action by this Commission.[16] Moreover, this is

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14895, 15233, and 15971, 2 FCC 2d at 758. In the instant case, it is the Spokane affiliates themselves which have requested carriage, although they are carried on Quincy's system via local translators. *See* Section 76.55(c) of the Commission's Rules.

[14] *See* Quincy's supplement, filed April 21, 1982, in *Quincy IV* proceedings.

[15] *E.g.*, petition for special relief filed November 27, 1979, by Quincy in *Quincy I* proceeding, at 8; "Petition for Reconsideration" filed May 28, 1980, by Quincy in *Quincy II* proceeding, at 3; letter filed June 23, 1981, by Quincy in *Quincy II* proceeding.

[16] Despite Quincy's complaints of lost subscribers, we note that the system had only 609 subscribers at the inception of this proceeding. Petition for special relief filed November 27, 1979, by Quincy in *Quincy I* proceeding, at 2.

underscored by a careful reading of the subscriber letters submitted by Quincy. In addition, that certain program services which Quincy now carries on Tier II may allegedly be more popular than the Spokane affiliates is not grounds for waiver. *E.g., Pioneer Cablevision Corp.* (Endicott, New York), 50 FCC 2d 821, 822 (1975). Having considered "[Quincy's] claims in light of the current facts pertaining to [Quincy's] channel capacity, tier structure, and other factual developments . . .," *Quincy Cable TV, Inc. v. FCC*, 730 F.2d at 1551, we find no reason to depart from our previous decisions, which we view as representing a consistent and rational policy.

11. In view of the foregoing, we find that grant of the waiver requested by Quincy is not in the public interest.

12. Accordingly, IT IS ORDERED, That the objections raised by Quincy Cable TV, Inc. on remand from the United States Court of Appeals for the District of Columbia ARE DENIED, and our previous disposition of this case IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX E

§ 76.57 Provisions for systems operating in communities located outside of all major and smaller television markets.

A community unit operating in a community located wholly outside all major and smaller television markets, as defined in § 76.5, shall carry television broadcast signals in accordance with the following provisions:

(a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;

(2) Television translator stations with 100 watts or higher power serving the community of the community unit, and, as to community units that commence operations or expand channel capacity after March 30, 1972, non-commercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educational translator station;

(3) Noncommercial educational television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;

(4) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry any additional television signals.

[37 FR 3278, Feb. 12, 1972, as amended at 37 FR 13866, July 14, 1972; 42 FR 19346, Apr. 13, 1977; 45 FR 60299, Sept. 11, 1980]

§ 76.59 Provisions for smaller television markets.

A community unit operating in a community located in whole or in part within a smaller television market, as defined in § 76.5, shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such community unit may carry or, on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part;

(2) Noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;

(3) Commercial television broadcast stations licensed to communities in other smaller television markets, within whose Grade B contours the community of the community unit is located, in whole or in part;

(4) Television broadcast stations licensed to other communities which are generally considered to be part of the same smaller television market (Example: Burlington, Vt. —Plattsburgh, N.Y., television market);

(5) Television translator stations with 100 watts or higher power serving the community of the community unit and, as to community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educational translator station;

(6) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry any additional television signals.

(c) Where the community is located wholly or partially within one of the major television markets listed in § 76.51 (a) and also wholly or partially within a smaller television market, the carriage provisions for the major markets shall apply.

(Secs. 2, 3, 4, 5, 301, 303, 307, 308, 309, 315, 317, 48 Stat., as amended, 1064, 1065, 1066, 1068, 1081, 1082, 1083, 1084, 1085, 1088, 1089; (47 U.S.C. 152, 153, 154, 155, 301, 303, 307, 308, 309, 315, 317))

[37 FR 3278, Feb. 12, 1972, as amended at 37 FR 13867, July 14, 1972; 42 FR 19346, Apr. 13, 1977; 45 FR 60299, Sept. 11, 1980]

§ 76.61 Provisions for the major television markets.

Where a system serves a community that is located in whole or in part within a major television market, that community unit shall carry television broadcast signals only in accordance with the following provisions:

(a) Any such community unit may carry, or on request of the relevant station licensee or permittee, shall carry the signals of:

(1) Television broadcast stations within whose specified zone the community of the community unit is located, in whole or in part: *Provided, however,* That where a community unit is located in the designated community of a major television market, it shall not carry the signal of a television station licensed to a designated community in another major television market, unless the designated community in which the community unit is located is wholly within the

specified zone (see § 76.5(f)) of the station, except as otherwise provided in this section;

(2)Noncommercial educational television broadcast stations within whose Grade B contours the community of the community unit is located, in whole or in part;

(3) Television translator stations with 100 watts or higher power serving the community of the community unit and, as to community units that commence operations or expand channel capacity after March 30, 1972, noncommercial educational translator stations with 5 watts or higher power serving the community of the community unit. In addition, any community unit may elect to carry the signal of any noncommercial educational translator station;

(4) Television broadcast stations licensed to other designated communities of the same major television [illegible] (Example: Cincinnati, Ohio-Newport, Ky., televisi[illegible]ket);

(5) Commercial television broadcast stations that are significantly viewed in the community of the community unit. See § 76.54.

(b) In addition to the television broadcast signals carried pursuant to paragraph (a) of this section, any such community unit may carry any additional television signals.

(Secs. 2, 3, 4, 5, 301, 303, 307, 308, 309, 315, 317, 48 Stat., as amended, 1064, 1065, 1066, 1068, 1081, 1082, 1083, 1084, 1085, 1088, 1089; (47 U.S.C. 152, 153, 154, 155, 301, 303, 307, 308, 309, 315, 317))

[37 FR 3278, Feb. 12, 1972, as amended at 37 FR 13867, July 14, 1972; 42 FR 19346, Apr. 13, 1977; 45 FR 60299, Sept. 11, 1980]

APPENDIX F

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M Street N.W.
Washington, D.C. 20554

August 2, 1985

COMMISSION WILL NOT APPEAL QUINCY CABLE TV v. FCC

The Commission directed the General Counsel not to pursue further appeal of the cable television mandatory carriage decision released July 19, 1985, by the U.S. Court of Appeals for the District of Columbia Circuit.[1] That decision vacated the Commission's "must carry" rules and becomes effective September 3, 1985, in the absence of a further order by the Court.

Pending the effective date of the Court's Order, and to permit other parties a full opportunity to pursue an appeal, the Commission will, in the interim, maintain the status quo of cable systems. That is, no new signal carriage will be required nor may cable systems delete currently carried local signals under the must-carry rules.

- FCC -

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[1] *Quincy Cable TV v. FCC*, No. 83-1283 (D.C. Cir., decided July 19, 1985)

August 2, 1985

Statement of Chairman Mark S. Fowler and Commissioners Mimi Weyforth Dawson and Dennis R. Patrick

Re: Appeal of *Quincy Cable TV v. FCC*

Our decision not to appeal the Court's ruling in this case is one that comes after much thought about the role of the must carry rules in the mass media marketplace of today. Those rules displaced consumer choice in many cases and so interfered with the marketplace. But this interference was defended by the Commission in view of the partial exemption from the market which cable operators had under the copyright law. After *Quincy* the situation has again become unbalanced and deserves a solution.

Although this *Quincy* decision takes the first step toward a true marketplace for the distribution of programming by cable systems, we believe that the mass media marketplace will not be set entirely right until cable's copyright immunity is replaced with a scheme of full copyright liability, allowing unimpeded negotiations between the parties.

The *Quincy* decision focused very directly on the First Amendment issues involved. Because the constitutional analysis as to cable represents a positive step toward recognizing full First Amendment protection for all forms of electronic media, we will not challenge it.

We have carefully considered the possibility of retooling the must carry rules. At this point we cannot conceive of a new set of rules which would accomplish the Commission's policy goals and would meet the constitutional test outlined in the *Quincy* decision. Accordingly, we believe that the better course is to seek an equitable realigning of free marketplace forces rather than another false equilibrium of intrusions on the rights of cable operators, broadcasters, and copyright holders.

NEWS

FEDERAL COMMUNICATIONS COMMISSION
1919 M Street N.W.
Washington, D.C. 20554

6197

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F 2d 385 (D.C. Circ. 1975)

August 5, 1985

COMMISSIONER JAMES H. QUELLO ISSUES DISSENTING STATEMENT ON DECISION NOT TO APPEAL CABLE "MUST CARRY" DECISION

On August 2, the Commission directed the General Counsel not to pursue further appeal of the cable television mandatory carriage decision released July 19, 1985, by the U.S. Court of Appeals for the District of Columbia Circuit. That decision vacated the Commission's "must carry" rules and becomes effective September 3, 1985, in the absence of a further order by the Court. Commissioners Fowler (Chairman), Dawson and Patrick had issued a joint statement. Commissioner Quello has now issued the attached dissenting statement. Commissioner Rivera did not participate.

- FCC -

Attachment

August 2, 1985

Dissenting Statement of
FCC Commissioner James H. Quello

In re: Public Notice: "Commission will Not Appeal *Quincy Cable TV v. FCC,*" released August 2, 1985.

I am writing to indicate my opposition to the Commission's decision not to pursue any appeal of *Quincy Cable TV, Inc. v. FCC (Quincy),* D.C. Cir. No. 83-1283 (July 19, 1985). While the cable industry's embrace of the First Amendment has found recent favor in the courts, this particular interpretation is both unnecessary and excessive, and it should not go unchallenged.

In the first place, the court has improperly gone out of its way to make broad constitutional pronouncements that are unnecessary to its basic determination that the Commission has not adequately demonstrated the need for its must-carry rules. In this regard, it is relevant that the Supreme Court recently relied upon the existence of the must-carry rules as evidence of federal preemption, and it failed to even hint at any constitutional infirmity. *See Capital Cities Cable, Inc. v. Crisp,* 104 S.Ct. 2694 (1984).

In the second place, the *Quincy* opinion improperly dismisses the importance of the current local regulatory environment in which cable companies generally enjoy exclusive franchises and thus operate as bottlenecks to viewer choice. *Quincy, supra* (slip op. at 31-32). Similarly, while the cable industry, and now the court, talk at length about A/B switches and their utility in receiving over-the-air services, such points blink the reality that these devices are quite unlikely to be installed or used.

I do not argue that the must-carry rules should not be revisited to address legitimate concerns raised by the court. I favor a Notice of Proposed Rulemaking to do just that.

Even if the Commission should determine to abandon its must-carry rules, it would be far preferrable to do so in a rulemaking context with full opportunity for public comment on the wide-ranging effects that would flow from such a decision (*e.g.*, the impact on local rate regulation of cable).

By its failure to appeal this decision, the Commission is abandoning rules that continue to have the sound purpose of assuring local diversity. By simply accepting the policy determinations inherent in this opinion, the Commission is abandoning its own congressional mandate to formulate communication policy in the public interest. I dissent.

NEWS

FEDERAL COMMUNICATIONS COMMISSION
1919 M Street N.W.
Washington, D.C. 20554

6973

This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC, 515 F 2d 385 (D.C. Circ. 1975)

September 10, 1985

CABLE MUST CARRY RULES VACATED

In its decision in *Quincy Cable TV, Inc. v. FCC*, No. 80-1283 (D.C. Cir. July 19, 1985), the United States Court of Appeals held that the Commission's regulations requiring that cable television systems carry certain local television broadcast stations violate the cable operators' rights under the First Amendment to the Constitution of the United States. On September 9, 1985, the Supreme Court refused to stay this ruling. The mandate of the Court of Appeals thus issues today, September 10, 1985. The must carry rules had remained in effect pending the issuance of the mandate.

Effective today, September 10, 1985, the Commission's must carry rules are set aside and will no longer be enforced. The National Association of Broadcasters and other parties have indicated that they will file a Writ of Certiorari in the Supreme Court. Therefore, the rules will remain codified in Title 47, Code of Federal Regulations, pending a final decision of the Supreme Court.

The Commission's Mass Media Bureau has taken a number of actions related to this matter. It has dismissed as moot over 230 pending proceedings related to the must

carry rules. These include requests for special relief filed by cable systems, requests for changes to the Commission's list of hyphenated markets, and certain requests for enforcement action against cable systems.

The Bureau also issued an Order reopening for 30 days the period for filing comments in MM Docket No. 84-1296 concerning the recently adopted rules implementing the provisions of the Cable Communications Policy Act of 1984. Such comments should be limited to the definition of basic cable service in Section 76.5(pp) of the Commission's rules.

Additionally, the Mass Media Bureau has accepted certain recently filed petitions which are not invalidated by the decision concerning mandatory signal carriage. These petitions relate to such matters as requests for declaratory rulings involving "significantly viewed" status. Such status is still a matter of interest under the Commission's new rules related to effective competition and/or copyright.

For further information contact Stephen R. Ross, Cable Television Branch (202) 632-7480. For information relating to MM Docket 84-1296 contact Bruce A. Franca, Policy Analysis Branch (202) 632-6302.

- FCC -

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

6981

MM Docket No. 84-1296

In the Matter of:

AMENDMENTS OF PARTS 1, 63, AND 76 OF THE COMMISSION'S RULES TO IMPLEMENT THE PROVISIONS OF THE CABLE COMMUNICATIONS POLICY ACT OF 1984

ORDER REOPENING THE PERIOD FOR FILING COMMENTS

Adopted: September 10, 1985 Released: September 10, 1985

By the Chief, Mass Media Bureau:

1. On April 11, 1985, the Commission adopted a *Report and Order* in MM Docket No. 84-1296, 58 RR 2d 1 (1985), amending its rules in order to implement certain provisions of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, Section 1 *et seq.*, 98 Stat. 2779 (1984). Various parties have filed petitions for reconsideration of the *Report and Order*, and responsive pleadings.

2. In its decision in *Quincy Cable TV, Inc. v. FCC*, No. 83-1283 (D.C. Cir. July 19, 1985), the United States Court of Appeals held that the Commission's regulations requiring that cable television systems carry certain local television broadcast stations violate cable operators' rights under the First Amendment to the Constitution of the United States.

3. In view of this decision, the record in MM Docket No. 84-1296 will be reopened to enable parties to comment upon the impact that the Court's decision has on the issues discussed in that *Report and Order*. Comments should be

limited to how the decision affects the definition of basic cable service in Section 76.5(pp) of the Commission's Rules.

4. Accordingly, IT IS ORDERED, pursuant to Section 1.415(d) of the Commission's Rules, That the period for filing comments in the above captioned proceeding is REOPENED to and including October 17, 1985.

5. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the *Report and Order.*

6. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and 5 copies of all comments filed in this proceeding shall be furnished to the Commission. Participants filing the required copies who also wish each Commissioner to have a personal copy of the comments may file an additional 6 copies. Members of the general public who wish to express their interest by participating informally in the rule making proceeding may do so by submitting one copy of the comments, without regard to form, provided only that the Docket Number is specified in the heading. Responses will be available for public inspection during regular business hours in the Commission's Dockets Reference Room (Room 239) at its headquarters in Washington, D.C. (1919 M Street, Northwest).

7. This action is taken pursuant to authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's Rules.

8. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are

advised that *ex parte* contacts are permitted from the time the Commission adopts a *Notice of Proposed Rule Making* until the time a public notice is issued stating that substantial disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communications (other than formal written comments, pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commisison's Secretary for inclusion in the public file, with a copy to the Commission's official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by Docket Number the proceeding to which its relates. See generally, Section 1.1201 of the Commission's Rules.

9. For further information concerning this proceeding, contact Bruce A. Franca, Policy Analysis Branch, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

/s/ JAMES C. MCKINNEY

James C. McKinney
Chief, Mass Media Bureau

Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

QUINCY CABLE TV, INC., *et al.*,
Respondents.

BRIEF OF RESPONDENT NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS IN SUPPORT OF CERTIORARI PURSUANT TO RULE 19.6

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October 15, 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-502

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

QUINCY CABLE TV, INC., *et al.*,
Respondents.

BRIEF OF RESPONDENT NAPTS IN SUPPORT OF CERTIORARI PURSUANT TO RULE 19.6

INTRODUCTION

Respondent the National Association of Public Television Stations (NAPTS) submits this brief pursuant to Supreme Court Rule 19.6, in support of the joint petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.[1] NAPTS was an intervenor in the Court of Appeals on the same side as the petitioners in this Court.

NAPTS is a nonprofit membership organization established by the licensees of the nation's public television sta-

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[1]The decision below is now reported at 768 F.2d 1434.

tions. NAPTS coordinates the activities and represents the interests of public television station licensees before Congress, administrative agencies, and a variety of other forums.

NAPTS represents noncommercial, public television licensees who are dedicated to providing alternative high quality television services unavailable from the commercial television industry. This program service appeals to all segments of the population, but audiences for individual programs are smaller than for the mass-audience-appeal programming of our commercial counterparts. Sixty percent of the nation's public television stations operate on UHF channels, and it is those channels that are likely to be injured most by loss of cable carriage rights.

STATEMENT OF POSITION AND INTEREST OF NAPTS

NAPTS hereby incorporates by reference petitioners' Questions Presented, Statement of the Case, and the Reasons for Granting the Writ set out in the Joint Petition for Certiorari.[2]

The lower court's decision finds unconstitutional longstanding FCC regulations that foster two well established national policies: (1) the widest possible dissemination of

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[2]We note in addition that the lower court's expansive reading of Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) (*see* Petitioners' Appendix, pp. 37a-40a), seems particularly questionable in view of Pruneyard Shopping Center v. Robins, 447 U.S. 74, 88 (1980), which explains *Tornillo* on the basis urged in the Joint Petition. *See* Pet., p. 9.

We also note that the Court presently has under submission another case in which a mandatory access or "must carry" requirement is being challenged as an abridgement of a claimed First Amendment right *not* to speak. Pacific Gas & Electric Co. v. PUC, No. 84-1044 (Argued Oct. 8, 1985).

noncommercial, educational television broadcasting service; and (2) increased development of UHF (Channels 14 and above) broadcast service. Both of these policies are designed to bring about increased diversity of locally-based television broadcast service as well as other benefits including expanded employment and ownership opportunities in the broadcast industry.

The Congress and the FCC repeatedly have indicated that the widest possible dissemination of public television service to all Americans is a fundamental national policy.[3] The government has channeled over 1.7 billion dollars through the Corporation for Public Broadcasting since passage of the Public Broadcasting Act of 1967 to fund and promote this service. The Commission has also explicitly recognized that the national policy of promoting public television is part of the basis for the must-carry requirements. In its earliest promulgation of the must-carry rules, the Commission affirmed that "established national policy . . . seeks to promote the widest reception of educational television service."[4] The must-carry rules promote this fundamental national objective by ensuring that cable systems carry local public television stations without regard to the size of

---

[3]*See, e.g.*, Television Assignments (Sixth Report and Order), 41 F.C.C. 148, 158-164 (1952); All Channel Television Receiver Act, Pub. L. No. 87-529 (1962), 76 Stat. 150 (codified at 47 U.S.C. § 303(s) and § 330) and S.Rep. No. 1526, 87th Cong. 2d Sess. 2-3 (1962); Educational Broadcasting Facilities Act, Pub. L. No. 87-447 (1962), 76 Stat. 64 (codified at 47 U.S.C. § 390 *et seq.*); Public Broadcasting Act of 1967, Pub. L. No. 90-129 (1967), 81 Stat. 365 (codified at 47 U.S.C. § 390 *et seq.*).

[4]Rules re Microwave-served CATV (First Report and Order), 38 F.C.C. 683, 705, n. 34 (1965). *See also* CATV (Second Report and Order), 2 F.C.C.2d 725, 753, 761-62 (1966); United States v. Southwestern Cable Co., 392 U.S. 157, 174-75 (1968).

their audience and by enhancing the signal reception and coverage of public television stations.

Similarly, promotion of UHF broadcasting has been an established national communications policy for many years.[5] This policy serves the goals of diversity and localism, both of which contribute to a vital and diverse broadcasting industry as well as to the "maximum efficient utilization of the broadcasting spectrum space. . . . ."[6] The must-carry rules promote these two national objectives by ensuring that cable systems carry local public television stations without regard to the size of their audience and by enhancing the signal reception and coverage of public television stations. UHF signals are inferior to VHF in several ways: they require much higher power to cover the same area as VHF signals; their transmission costs are much higher; and they are more difficult to receive clearly, requiring outdoor antennas more often than VHF signals. Cable carriage renders UHF signals virtually indistinguishable from VHF signals, thereby eliminating the handicap UHF broadcasters labor under in competition with VHF stations.[7]

If the FCC had simply elected, as a matter of agency policy-making, to abandon these well established national policies and therefore to repeal the must-carry rules, such a decision would certainly have warranted the most careful

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[5]*See, e.g.*, All Channel Receiver Act, *supra;* S.Rep. No. 1526, 87th Cong., 2d Sess. 2-3 (1962); H.Rep. No. 1559, 87th Cong. 2d Sess. 2-3 (1962); Report and Order, 21 F.C.C.2d 245, 247 (1970).

[6]S.Rep. No. 1526, *supra*, at 2.

[7]The Commission has explicitly found that UHF stations would be at a significant competitive disadvantage to VHF stations without the benefit of must-carry. *See, e.g.*, Inquiry Into the Economic Relationship Between Broadcasting and Cable Television, 71 F.C.C.2d 632, 713 (1979).

and searching judidical review. Here, where the lower court has adopted a novel interpretation of the First Amendment that requires at least a partial abandonment of these national policies, the desirability of a definitive ruling by this Court is increased. The desirability of such a ruling is underscored by the fact that three members of the FCC are apparently willing to accept the lower court's decision even though it requires a substantial retreat from the policies of fostering the development of public broadcasting and greater UHF development.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-502

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

QUINCY CABLE TV, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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October 25, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Should this Court review a decision of United States Court of Appeals for the District of Columbia Circuit holding that certain rules of the Federal Communications Commission mandating the carriage of television broadcast signals by cable systems were in violation of the First Amendment,

(a) where the court below invalidated only the rules in their current form;

(b) where the lower court's decision is founded upon a proper application of long-standing First Amendment principles and is consistent with prior decisions of this Court and other lower courts; and

(c) where the FCC has announced its willingness to consider proposals to recraft mandatory signal carriage rules in a manner intended to pass constitutional scrutiny?

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QUINCY CABLE TV, INC., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT TURNER BROADCASTING SYSTEM, INC.'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Turner Broadcasting System, Inc. ("TBS")[1] respectfully requests that this Court deny the petition for certiorari, filed September 23, 1985, seeking plenary review of a decision by the United States Court of Appeals for the District of Columbia Circuit vacating regulations (the "must carry" rules) established by the Fed-

[1] Pursuant to Supreme Court Rule 28.1, TBS states that it has no parent company or companies, and that all of its subsidiaries are wholly owned by TBS.

eral Communications Commission ("FCC" or "Commission") that required operators of cable television systems to carry, upon request, the signals of all television broadcast stations deemed "local" to the cable community.[2]

TBS initially petitioned the FCC to institute a rulemaking proceeding to delete these regulations in 1980, arguing that the rules abridged the constitutional rights of cable programmers by severely impeding, and often times completely barring, access to their intended audience, cable subscribers. Quincy Cable TV, Inc., the other respondent in this case, similarly challenged the constitutionality of the rules as applied to cable operators, since they impermissibly intruded upon the editorial discretion of cable operators in choosing those speakers, whether broadcast-originated or cable programmer, they wished to carry.

On July 19, 1985, a unanimous panel of the Court of Appeals ruled that the must-carry rules "are fundamentally at odds with the First Amendment and, as currently drafted, can no longer be permitted to stand." (Pet. App. 8a). The court limited its ruling to the must carry rules in their current form, and made clear that "[s]hould the Commission wish to recraft the rules in a manner more sensitive to the First Amendment concerns we outline today, it is, of course, free to do so." (Pet. App. at 60a).

On August 2, 1985, the FCC, the expert agency charged with protecting the public interest and a respondent below, decided not to challenge the decision of the court of appeals. (Pet. App. 137a). A majority of Commissioners, in fact, agreed that the decision "represents a positive step toward recognizing full First Amendment protection for all forms of electronic media." (Pet. App. 138a). Petitioners, a group including trade associations of television broadcast licensees and networks

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[2] 47 C.F.R. §§ 76.57, 76.59, 76.61, Pet. App. 133a-136a.

as well as a number of individual licensees and one such network, intervenors below, then sought a stay of the lower court's mandate. Their Motion for Stay of Issuance of the Mandate was denied by the court of appeals on September 3, 1985. On September 9, 1985, their Application to the Honorable Chief Justice, as Circuit Justice for the District of Columbia Circuit, for a Stay Pending Disposition of a Petition for Writ of Certiorari was also denied.

STATEMENT OF FACTS

TBS is a diversified corporation whose holdings include a broadcast television station, WTBS, Atlanta, Georgia, retransmitted by an intermediate carrier via satellite to several thousand cable systems nationwide, and two non-broadcast cable news services: Cable News Network ("CNN") and CNN Headline News.

CNN, CNN Headline News and WTBS are part of a recent phenomenon, cable programmers, made possible by the growth of the cable industry and the development of a satellite-based national cable programming distribution system. Today, this program industry includes approximately fifty national and regional programming services that provide entertainment and sports programming and specialize in such areas as news, financial, and other information services, coverage of congressional deliberations, and children's, health, religious and minority-oriented programming. This rich diversity in program offerings could not be achieved through scarcely allocated over-the-air broadcast stations.

For cable programmers like CNN, CNN Headline News and WTBS (outside of Atlanta) to reach their viewing audience, they must obtain access to a channel on a cable system. Cable systems can theoretically choose what to present to their audiences from among local broadcast television stations, signals of distant broadcast television stations, such as WTBS, locally-originated or

access programming, and non-broadcast programming specifically designed for cable audiences, such as CNN.

Cable television systems are limited by cost and technical restraints in the number of channels over which programming may be distributed to the public. Despite wide publicity given to a few recent urban cable systems operating 50-100 channels, nearly 20 percent of the cable systems in the United States have twelve or fewer available channels; an additional 32% have fewer than 30 channels.[3]

Until the decision of the lower court, cable programmers' access was further restricted, and in some cases foreclosed, by the FCC's "must carry" rules. These rules required a cable operator to retransmit all local broadcast signals with no compensation from the "local" broadcaster and without regard to the desires of cable viewers. Cable programmers had to compete for any cable system channel capacity left over.

Thus, the rules forced cable operators to carry one type of programming (local broadcast signals) in derogation of the rights of all other programmers and the interests of the public in the receipt of diverse services. Local broadcasters automatically obtained as many channels as needed, up to the full technical limits of the cable system.

The must carry rules also operated frequently to require a cable operator to carry more than one channel affiliated with the same network, thereby filling its limited channel capacity with duplicative programming, while depriving the public of access to other distinctive voices. In this government-imposed scheme, the preferences of viewers and listeners, whose rights are supposed to be paramount in any regulatory intrusion on broadcast First Amendment freedoms, were explicitly deemed

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[3] Television & Cable Factbook (1985 Ed.) at 1385.

irrelevant by the FCC in its enforcement of the must carry rules.[4]

The must-carry rules were originally adopted by the FCC in 1965, and applied to all cable systems the next year.[5] At the time, no cable programmers existed. The FCC articulated a two-fold rationale for the rules. First, the Commission believed that cable television was a "supplementary service" to, rather than a substitute for, off-the-air television service.[6] Because cable was nothing more than an "alternative way[] of making [broadcast] television programs available to the public," every local broadcaster was "entitled" to the protective treatment of the must carry rules.[7] Second, mandatory carriage was intended to prevent "unfair" competition between cable television and local broadcast stations for audiences they are licensed to serve. Otherwise, the Commission opined, viewers would lose access to "free" TV programming of local broadcast stations, since markets "fractionalized" by cable competition would lead to a loss of television viewers and a resulting fatal loss of advertising revenues for over-the-air broadcasters.[8] The

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[4] In an earlier stage of the instant case, the FCC explicitly stated that "[w]e have consistently found [viewer preference] insufficient to overcome the policies of our mandatory signal carriage rules." *Quincy Cable TV, Inc.*, 89 FCC 2d 1128, 1137 (1982).

[5] *First Report and Order in Docket No. 14895*, 38 FCC 683 (1965); *Second Report and Order in Docket No. 14895*, 2 FCC 2d 725 (1966).

[6] 38 FCC at 705.

[7] *Id.* at 713.

[8] *Id.* at 709-12. The FCC asserted jurisdiction over cable in part to preclude this possibility under 47 U.S.C. § 307(b), pursuant to which the FCC is charged to make an "equitable distribution" of stations to states and communities.

Contrary to petitioners' suggestion (Pet. 3), the Commission did not attempt to justify the must-carry rules on the grounds that cable operators could obtain and retransmit broadcast signals with-

Commission admitted that it did not have conclusive evidence that such a development would occur, yet it felt it did not need to wait "until the bodies pile up" before it acted.[9]

Over the succeeding 20 years, the FCC never reexamined these rules or attempted to ascertain whether they were necessary to maintain the economic vitality of local broadcasting. To the contrary, in 1971 and again in 1972, the Commission almost mechanically reaffirmed them.[10]

During the late 1970's however, the Commission for the first time began to examine rigorously some of the basic premises of its overall approach to cable regulation. In its review, the FCC found that its regulation of cable development had been premised on an "intuitive" model that cable competition would adversely affect local broadcast service that was without factual and legal support.[11]

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out negotiating copyright agreements or retransmission consent under Section 325 of the Communications Act (47 U.S.C. § 325). The Commission did attempt to offset these perceived advantages, but it did so by adopting other rules restricting cable operators' carriage of signals of distant broadcast signals. *See, e.g.*, 38 FCC at 705-06; 2 FCC 2d at 778-780. The Commission repealed those restrictions in 1980. *See* note 12, *infra.*

[9] 38 FCC at 701.

[10] *See Commission Proposals for Regulation of Cable Television*, 31 FCC 2d 115, 118-120 (1971); *Cable Television Report and Order*, 36 FCC 2d 143, 173, *recon.*, 36 FCC 2d 326 (1972).

[11] Its initial analsyis following three years of study was published in 1979. *Inquiry into the Economic Relationship Between Television Broadcasting and Cable Television*, 71 FCC 2d 632 (1979) (*"Economic Inquiry Report"*).

Most pertinent, the Commission found that the competitive importation of distant signals by cable television did not so fragment the market for local broadcast stations as to threaten loss of over-the-air service to non-cable homes. *Id.* at 715. It concluded as well that cable should no longer be viewed merely as an auxiliary service

These findings led the Commission to subsequently eliminate the so-called distant signal carriage and syndicated exclusivity rules.[12]

The Commission thus repudiated the rationale upon which it had previously premised the must carry rules, that cable was "merely a supplement to broadcasting," and found there was no evidence to show that cable competition to broadcasters would be unfair. Yet, while the Commission acknowledged that the must carry regulations "may warrant review on [their] own merits," [13] because they were based upon the same intuitive assumptions now discredited by the FCC, it undertook no such comparable review.

The late 1970's saw a second important development that affects the constitutional status of the must carry rules—the emergence of national cable programmers. This new program industry developed partly in response to the 1976 FCC regulation changes,[14] the development of a domestic satellite distribution system, the deregulation

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supplemental to local broadcasting, but as a legitimate independent vehicle for providing alternative video services to the public. *Id.* at 645-46.

[12] *CATV Syndicated Program Exclusivity Rules (Report and Order in Docket Nos. 20988 and 21284)*, 79 FCC 2d 663 (1980). This Commission action was upheld on appeal by the Second Circuit. *Malrite T.V. of New York v. FCC*, 652 F.2d 1140, 1152 (2d Cir. 1981), *cert. denied*, 454 U.S. 1143 (1982).

[13] *Cable Television Syndicated Exclusivity Rules*, 71 FCC 2d 1004, 1006 (1979).

[14] In 1976, the FCC eliminated the so-called "anti-leapfrogging" rules, which had forced cable operators to grant priority of carriage to distant television stations located closest to a cable system in any given television market. Elimination of the leapfrogging requirement led to the development of "superstations" like WTBS, which could now be carried by cable systems nationwide through satellite distribution. *Report and Order in Docket No. 20487*, 57 FCC 2d 625 (1976).

of earth stations capable of receiving satellite broadcast signals, and the passage of the 1976 Copyright Act, 17 U.S.C. §§ 101 *et seq.*, that included a compulsory license for cable retransmissions of broadcast signals.

Starting with the emergence of Home Box Office (a pay movie channel) in 1976, an entire industry of cable programmers arose, whose "rich variety" [15] of services are often tailored to specific audiences. None of these cable programmers existed when the must carry rules were imposed—all were adversely affected by them by having their access to their only channel of communication subordinated to all local broadcasters.

The absence of any rational basis for the rules in light of the cable industry's development and the emergence of cable programmers lay at the heart of the lower court's decision invalidating them. In two decades, cable had matured from an adjunct to broadcasting to a co-equal video service, selecting from among a variety of programming voices. Under those circumstances, the must carry regulations, which attempted to perpetuate an archaic relationship in which cable was subsidiary to broadcasters and failed to accommodate the rights of cable programmers, could not long stand.[16]

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[15] *In re Community Cable TV, Inc.*, 98 FCC 2d 1180 (1984).

[16] Thus, the court found that rules served only to "bolster the fortunes of local broadcasters" by giving broadcasters "an overwhelming competitive advantage over cable programmers" (Pet. App. 36a), offering indiscriminate protection to "each and every local broadcaster" regardless of the quantity of local programming actually available from that broadcaster and regardless of "whether or to what degree the affected cable system poses a threat to [that broadcaster's] economic well-being." (Pet. App. 54a-57a). The goal of preserving localism had become "undifferentiated protectionism" (Pet. App. 58a-59a), and the rules themselves were "insufficiently tailored to justify their substantial interference with First Amendment rights." (Pet. App. 60a).

SUMMARY OF ARGUMENT

Petitioners contend that the decision of the Court of Appeals represents a substantial departure in First Amendment law generally, and, more specifically, in the treatment of cable operators. They also assert that the lower court should have returned this case to the FCC before rendering judgment.

Petitioners' arguments do not bear scrutiny. In fact, the court of appeals broke no new First Amendment ground in concluding that the regulations at issue were an unjustified and grossly overinclusive attempt to implement particular goals of communications policy. The court found that those regulations impermissibly favored some speakers over others, in violation of this Court's long-standing principles. In reaching this conclusion, the court correctly applied the most lenient standard of review reserved for incidental restrictions on speech as established in *United States v. O'Brien*.[17] The court was also careful to balance its deference to agency expertise with a legitimate concern for First Amendment freedoms.

Contrary to petitioners' suggestions, this Court has never sanctioned the constitutionality of the must carry rules. While a single court of appeals' decision almost 20 years ago did uphold those rules against a First Amendment challenge, that decision was based on an asserted governmental interest, *i.e.*, spectrum scarcity, that the FCC has acknowledged does not apply to the must carry rules. Recent decisions in other circuits in fact reflect a recognition that the First Amendment limits government regulation of cable operators and programmers.

The court below did not attempt to extend the reach of its opinion beyond the must carry rules in their current form. In fact, the court invited the FCC to attempt to recraft the rules in a manner consistent with the First

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[17] 391 U.S. 367 (1968).

Amendment, and the FCC has expressed its willingness to attempt to do so. In response, a number of the petitioners have requested that the Commission commence a proceeding intended to revise the rules.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS CONSTITUTIONALLY CORRECT AND IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND OTHER LOWER FEDERAL COURTS.

Petitioners argue for review on the grounds that the lower court's decision raises novel constitutional issues (Pet. 8-12), and is inconsistent with prior decisions of this Court and other lower courts involving cable issues. (Pet. 12-15). Neither argument bears close scrutiny.

A. The court of appeals broke no new First Amendment ground in reaching its conclusion that the must-carry rules are fundamentally at odds with the Constitution. To the contrary, the court recognized that "differences in the characteristics of news media justify differences in the First Amendment standards applied to them" (Pet. App. 29a), based chiefly upon this Court's recognition that the First Amendment tolerates far more intrusive regulation of broadcasters because of "the inescapable physical limitations on the number of voices that can simultaneously be carried over the electromagnetic spectrum," *i.e.*, the scarcity rationale. *Id.* at 29, *citing FCC v. League of Women Voters of California*, —— U.S. ——, 104 S. Ct. 3106, 3116 (1984); Pet. App. 31a-32a.

As the FCC itself indicated to the court below, however, the must carry regulations are not based upon the scarcity rationale that provides the constitutional underpinnings for broadcast regulation.[18] *FCC Brief, Quincy*

[18] Petitioners' suggestion (Pet. 23) that it was the court of appeals that decided that the scarcity rationale was inapplicable is entirely specious.

Cable, D.C. Cir. No. 83-1283 at 19-23 (filed July 15, 1983). In the absence of that rationale, regulations restricting the First Amendment rights of cable operators are subject to a stricter standard of review than, say, the rules requiring balanced coverage of controversial public issues on radio and television stations. Thus, the court properly recognized that the must carry rules work "substantial limitations . . . on the [cable] operator's otherwise broad discretion to select the programming it offers to subscribers." (Pet. App. 37a.) This is far from an incidental intrusion, since "[o]nce outside the special constitutional realm reserved for privileged occupants of the physically scarce airwaves, the First Amendment guards against governmental intrusions into the editorial function even more jealously. *Compare Red Lion Broadcasting Co. v. FCC*, *supra*, 395 U.S. 367 [with *Miami Herald Publishing Co. v. Tornillo*]". (Pet. App. 39a).

Equally important, but virtually ignored by petitioners (Pet. 8 n.10), the court also found that the rules impermissibly interfered with the rights of *cable programmers*, such as Cable News Network, Black Entertainment Television, and The Disney Channel, since they are "explicitly designed to 'favor[] certain classes of speakers over others'" and "[t]heir very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming competitive advantage over cable programmers." (Pet. App. 36a) (citations omitted). This result conflicts with this Court's oft-stated principle that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment". *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (*per curiam*); Pet. App. 37a. And, most importantly, the court found that these rules consciously ignore public preference, and therefore clash irreconcilably with this Court's basic principle that the interests of viewers should

be considered "paramount" in the First Amendment calculus. (Pet. App. 41a) (*quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)).

B. Petitioners attempt to concoct conflicts between the instant opinion and the decisions of other courts of appeals and prior Supreme Court opinions. However, these supposed "conflicts" were considered and persuasively answered by the court of appeals, and upon analysis, simply do not exist.

The fact is that this Court has never upheld the constitutionality of the must carry rules, but instead has specifically disclaimed reaching any First Amendment issues with respect to cable when those issues have been presented to it. *See, e.g., FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 n.19 (1979); *Capital Cities Cable, Inc. v. Crisp*, —— U.S. ——, 104 S. Ct. 2694, 2701 n.6 (1984); Pet. App. 19a, 22a. While this Court may have spoken to the FCC's *jurisdiction* to promulgate rules in general, it has not addressed the *constitutionality* of the particular rules adopted. *See, e.g., United States v. Southwestern Cable*, 392 U.S. 157, 167 (1968).[19] Indeed, to the extent the Court has addressed the constitutional rights of cable operators at all, it has determined that this issue was "not frivolous." [20]

In order to bolster their argument that the court of appeals decision "conflicts" with other courts' decisions in the cable area, petitioners invoke *Black Hills Video Corp. v. FCC*, 339 F.2d 65 (8th Cir. 1968). Notwithstanding petitioners' suggestion that lower courts require

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[19] In *Southwestern Cable*, this Court "emphasize[d] that questions as to the validity of the specific rules promulgated by the Commission are not now before the Court." 392 U.S. at 168. Contrary to petitioners' assertions (Pet. 20), *Southwestern Cable* did not hold the must carry rules to be within the constitutional authority of the agency.

[20] *FCC v. Midwest Video Corp.*, 440 U.S. at 709 n.19.

"guidance" as to the continued vitality of *Black Hills Video* in light of lower court opinion here (Pet. 15), that decision has long been discredited by not only the Court of Appeals for the District of Columbia Circuit,[21] but by virtually every other circuit (including the Eighth Circuit itself) that has subsequently considered the First Amendment status of cable television.[22]

Moreover, *Black Hills Video* was premised on the theory that the must carry rules were justifiable by the FCC on a scarcity grounds—a rationale upon which the Commission does *not* rely in this case. Thus, *Black Hills Video* provides no comfort for petitioners in their search for a conflict to justify Supreme Court review.

If anything, the lower court's opinion is remarkably *consistent* with past precedent. In the 1977 *Home Box*

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[21] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 45 n.80 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

[22] The Eighth Circuit in *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1054 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979), implicitly rejected its earlier reasoning in *Black Hills Video* by recognizing that cable operators exercise a significant amount of editorial discretion protected under the First Amendment, and that cable-originated services have First Amendment rights that cannot be denied merely by speculating about the impact of cable television on broadcasters. The *Midwest Video* court referred to *Black Hills Video* as merely a case dealing with the FCC's authority to regulate "with respect to the technicalities involved in cable systems' use of *microwaves*. . . ." *Id.* at 1054 n.71.

In *Preferred Communications, Inc. v. City of Los Angeles*, the Ninth Circuit explicitly repudiated *Black Hills Video*, explaining

> [t]hat case involved the FCC's efforts to regulate an early community antenna system that merely retransmitted signals received from broadcasting stations; cable technology . . . has evolved significantly since the time of *Black Hills Video*. . . . More recent cases have expressly concluded that the physical scarcity rationale does not apply to cable. . . . *Black Hills Video*, therefore, is a doubtful precedent today.

754 F.2d 1396, 1404 (9th Cir. 1985), *jurisdictional statement filed*, No. 85-390 (Sept. 6, 1985).

Office[23] case, for instance, FCC cable regulations that protected broadcasters were found constitutionally infirm. Like the must carry rules, the pay cable rules at issue there protected broadcasters from the marketplace at the expense of cable operators and viewers. The pay cable rules were similarly based upon Commission intuition and the purported need to protect broadcasters against allegedly ruinous competition. Upon analysis, the pay cable rules could not be justified upon either constitutional or policy grounds. Therefore, the court of appeals overturned the FCC's detailed regulatory scheme for pay cable, which had been in place for many years.

Finally, this Court has never sanctioned the infringement of the constitutional rights of cable programmers such as TBS by government regulation. Nor has this Court ever validated a scheme that elevates the rights of some speakers, broadcasters, over the rights of other speakers, cable programmers. Accordingly, in finding that these rules impermissibly "bolster[ed] the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming competitive advantage over cable programmers,"[24] the court correctly applied the First Amendment teachings of this Court,[25] and petitioners do not even attempt to argue to the contrary.

C. In fact, it is petitioners who urge a result that would be totally alien to First Amendment jurisprudence. Petitioners argue that the rules only *appear* to restrict speech; in reality, "[a]ny immediate shortage of channels results not so much from the must carry rules as from the cable operators' lack of foresight as to optimal channel capacity, or perhaps a reluctance immediately to invest in greater channel capacity." (Pet. 9). In

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[23] *Home Box Office v. FCC, supra.*

[24] Pet. App. 36a.

[25] *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976).

effect, a cable operator's right to exercise editorial discretion to select from among the available sources of programming would be dependent upon the operator's willingness or ability to incur the substantial costs of increasing its channel capacity—all so that local broadcasters would be guaranteed access to the cable system.[26] However, this Court long ago rejected such "right-to-access" schemes as impermissible intrusions on First Amendment discretion.[27]

Petitioners also attempt to justify a lesser First Amendment protection where must carry is concerned by suggesting that cable operators are communications common carriers acting "merely [as] . . . conduit[s]," at least insofar as the transmission of broadcast signals is at issue. (Pet. 10). In their role as carriers, petitioners argue, cable operators are not entitled to full First Amendment rights. Petitioners' argument is baseless. As this Court has stated, "[t]he Commission may not regulate cable systems as common carriers, just as it may not impose such obligations on television broadcasters."[28] Petitioners have provided no grounds for

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[26] By contrast, telephone companies need not construct additional facilities to meet demand if their existing capacity is exhausted, *National Ass'n of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C.Cir.), *cert. denied*, 425 U.S. 992 (1976), notwithstanding their obligation to furnish service to the public upon reasonable request. *See* 47 U.S.C. § 201(a).

[27] *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974). In the First Amendment context, a cable operator's ability or incentive to add an additional channel is no different than a newspaper's ability to add an additional page of newsprint, although the latter is both technologically and economically easier. But even a compulsory access law that imposed no additional costs would "fail[] to clear the barriers of the First Amendment because of its intrusion into the function of editors." *Id.* at 258.

[28] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 708-09 (1979). *See also Philadelphia T.V. Broadcasting Co. v. FCC*, 359 F.2d 282 (D.C. Cir. 1966); 47 U.S.C. § 551(c) ("Any cable system shall not be

distinguishing constitutionally between cable's retransmission of a broadcast signal and its provision of cable programming.[29]

Finally, petitioners attempt to dismiss the lower court's holding that the must carry rules impermissibly infringe the First Amendment rights of cable programmers as little more than "a means of justifying the standing of Turner to complain about the must carry rules." (Pet. 8 n.10) (citation omitted). To the contrary, the court's finding that the must carry rules operated to "shut out [cable programmers] . . . from the only forum capable of conveying their programming," (Pet. App. 37a) and to "thwart[] viewer preferences" (Pet. App. 56a) contributed significantly to its conclusion that the rules imposed "substantial First Amendment costs." (Pet. App. 56a).

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subject to regulation as a common carrier . . .") (added by the Cable Communications Policy Act of 1984, Pub. L. 98-549). Likewise, the Commission has long held that cable is not a common carrier. *Second Report and Order in Docket 14895*, 2 FCC 2d 725, 731 (1966).

[29] Petitioners suggest that this Court's opinions in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Co. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), validate the argument that a cable operator is simply a "passive conduit" entitled to less than full First Amendment protection. (Pet. 10-11.) While *Fortnightly* and *Teleprompter* did hold that cable's carriage of broadcast signals amounted to passive retransmission, 392 U.S. at 400-01; 415 U.S. 408-09, both decisions were limited to the relatively narrow question of cable's place within the copyright scheme then in effect, an issue not pertinent to the instant case. In fact, because the copyright cases were adjudicated prior to the development of the cable programming industry, it is disingenuous at best to suggest that the opinions in those cases bear in any way on the constitutional claims advanced by cable programmers in this case. Neither of the cable copyright opinions purports to impose a generalized "carrier status" on cable in any context other than copyright. To the contrary, as noted above, both this Court and the FCC have squarely considered the argument that cable is a carrier, and both have explicitly rejected it.

The emergence of the cable programming industry laid bare the fundamental First Amendment infirmity that had always been inherent in the must carry rules: because the rules were designed to protect local broadcasters indiscriminately rather than local, community-oriented broadcast service (Pet. App. 52a-58a), they favored one class of speakers (broadcasters) over all others. As long as there were no speakers other than broadcasters seeking access to cable systems, the constitutionality of the rules remained untested. However, once other speakers—cable programmers—emerged who were restricted by this "grossly overinclusive" (Pet. App. 54a) attempt to protect broadcasters, the lower court was correct in finding that the must carry rules would not withstand First Amendment scrutiny. Ultimately, it is this recognition of cable programmers' rights that places the lower court's opinion in the mainstream of First Amendment jurisprudence and makes plenary review by this Court unnecessary.

II. THE LOWER COURT CORRECTLY APPLIED THE *O'BRIEN* TEST TO THE FACTS OF THIS CASE.

Rather than decide whether the must carry rules were invalid as a direct restraint on speech, the court below tested the rules against the more lenient standard of review reserved for merely incidental restrictions on speech established in *United States v. O'Brien*.[30] Even within this circumscribed inquiry, however, the court correctly determined that the rules missed the mark by a wide margin. There is simply no support for petitioners' contention that the lower court's application of *O'Brien* is so at variance with accepted practice as to justify an exercise of this Court's supervisory powers. (Pet. 18-21).

Under the first prong of the *O'Brien* test, *i.e.*, the existence and substantiality of the governmental inter-

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[30] 391 U.S. 367 (1968).

est, the court of appeals assumed that even if the economic assumptions on which the rules were predicated had not been repudiated by the Commission, the FCC had impermissibly

> failed to "put itself in a position to know" whether the problem the rule seeks to cure—the destruction of free, local television—"is a real or merely a fanciful threat." That approach . . . falls far short of the burden the government must affirmatively bear to prove the substantiality of the interest served by the rules.

(Pet. App. 49a) (*citing Home Box Office v. FCC*, 567 F.2d 9, 50, (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977)). The FCC originally imposed the rules in the 1960s, admittedly on its own intuition, "without waiting for the bodies to pile up." But as Judge Bork observed at oral argument in the court of appeals, the FCC could never point "to a single cadaver" in all this time to justify these heavy-handed regulations.[31]

Under the second prong of the *O'Brien* test, *i.e.*, the fit between the means and the end, the Court similarly found the FCC's rules fell wide outside even the most generous zone of permissible regulatory options. (Pet. App. 53a). The court found the must-carry rules to be grossly overbroad in many respects:

> —they indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator (Pet. App. 54a);

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[31] The court of appeals made clear that it was not holding that the Commission's asserted interest of preserving free, locally-oriented television was not a "substantial interest" (Pet. App. 41a-42a, 51a), but only that "in the particular circumstances of this constitutional challenge the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat." (Pet. App. 51a).

—the 18th broadcast station is guaranteed a channel on a cable system even if carriage effectively bumps a cable programmer like CNN previously on the system, regardless of the extent it impinges on the cable operator's editorial autonomy, and irrespective of whether it thwarts viewer preference (Pet. App. 56a);

—the rules indiscriminately protect every broadcaster regardless of whether or to what degree the affected cable system poses a threat to its economic well-being (Pet. App. 57a);

—the rules guarantee each broadcaster a second means of reaching its audience, even if the station carries *no local programming* at all. Pet. App. 54a. Under the regulations, a new UHF station broadcasting exclusively rock and roll videos has an absolute right to carriage;

—the rules require a cable system to carry broadcast signals that could *not* be received over the air in the system's community despite the stated intent of the rules "merely" was to ensure that "local" broadcasters could reach their over-the-air audience (Pet. App. 57a n.54).

The court stressed that it was not "quibbling over fine-tuning. . . . For . . . it is difficult to imagine a less discriminating or more overinclusive means of furthering the Commission's stated objectives." (Pet. App. 53a) (*citing FEC v. National Conservative Political Action Committee*, —— U.S. ——, 105 S. Ct. 1459, 1470 (1985)).

The petitioning broadcasters distort the court's opinion to make it appear that the FCC was held to some extraordinary standard. To the contrary, the court acknowledged "the breadth of the agency's discretion" (Pet. App. 53a) and expressed a reluctance to "second guess [the FCC's] expert judgment" (Pet. App. 51a), but concluded that deference to the agency was inappropriate in this case:

> As long as [the FCC] continues to rely on wholly speculative and unsubstantiated assumptions, . . . our powerful inclination to defer to the agency in its area of expertise must be tempered by our duty to assure that the government not infringe First Amendment freedoms unless it has adequately borne its heavy burden of justification. That, we have determined, the Commission has not done.

(Pet. App. 52a).

Thus, the court of appeals did not ride roughshod over agency discretion; it was particularly sensitive, as this Court has instructed it must be, to the necessity of the government advancing more than an unsubstantiated government interest where constitutional rights are involved. *See, e.g., City Council v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 2128 n.22 (1984); *Federal Election Commission v. National Conservative Political Action Committee, supra*, 105 S.Ct. at 1471 ("when the First Amendment is involved, [the] standard for review is 'rigorous' . . . .") (citation omitted); Pet. App. 43a n.44.[32]

Conceptually, must-carry regulation that struck a balance between localism and free television service on the one hand, and duplication, diversity and the rights of

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[32] Furthermore, unlike *Clark v. Community for Creative Non-Violence*, where the Court explained that the Park Service "regulation 'responds precisely to the substantive problems which legitimately concern the [Government],'" 104 S. Ct. 3065, 3071 (1984) (*citing City Council v. Taxpayers for Vincent*) the rules in this case fall well beyond the wide range of constitutionally permissible regulatory options. Pet. App. 52a-53a. Nor is this a case in which the lower court invalidated an otherwise valid content-neutral regulation on the basis of exceptional circumstances. Rather, the lower court correctly "evaluated [the must carry rules] in terms of their general effect," *United States v. Albertini*, —— U.S. ——, 105 S.Ct. 2897, 2907 (1985), but even under this lenient standard of review, the rules' restrictions on the time, place and manner of expression failed to pass constitutional muster.

cable programmers, operators, and viewers on the other, would present a different case than these rules. Under the circumstances of this case, where the court found it "difficult to imagine a less discriminating or more over-inclusive means of furthering the Commission's stated objectives," [33] the court of appeals correctly interpreted and applied this Court's consistent standards for judging the necessary fit between the means and ends.

III. THE LOWER COURT'S DECISION IS A NARROW ONE, INVALIDATING THE RULES ONLY IN THEIR CURRENT FORM.

Petitioners predict that the lower court's decision will upend the regulatory scheme governing the provision of cable service by inviting challenges to the recently-enacted federal cable statute [34] and by throwing the legitimacy of the local franchising process into chaos. For these reasons, petitioners argue, the lower court opinion cannot be allowed to stand. (Pet. 15-18).

Contrary to petitioners' unsupported assertions and fears, however, the lower court opinion focused exclusively on the constitutionality of the must carry rules then in effect and found those rules to be fundamentally flawed. Thus, the panel "stress[ed] that we have not found it necessary to decide whether any version of the rules would contravene the First Amendment. We hold only that in their current form they can no longer stand." (Pet. App. 60a).

Nonetheless, petitioners argue that the court's opinion is "an important precedent" that will "accelerate the instances in which state, local, and sometimes federal franchise provisions are challenged as unconstitutional." (Pet. 16). The mere fact that a case is "important,"

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[33] Pet. App. 53a.

[34] Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.*

however, does not justify plenary review unless it involves "a question of federal law which has not been, but should be, settled by this Court." [35] As discussed above, the lower court's opinion, while indisputably important, relies on well-established precedents of this Court.

Moreover, the lower court opinion is but one of a number of recent decisions that demonstrates a widespread recognition that the First Amendment significantly restricts government regulation of the electronic media.[36] These decisions, and the determination of the cable industry to secure its First Amendment rights, would probably have spurred challenges to the regulation of cable operators and programmers, even in the absence of the lower court opinion in the instant case.[37] Petitioners' speculation that that opinion may incre-

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[35] Supreme Court Rule 17.1(c).

[36] *See, e.g., Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *jurisdictional statement filed*, No. 85-390 (Sept. 6, 1985) (First Amendment bars auction process that results in the award of a single cable franchise); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) and *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985) (indecency statute applied to cable violates First Amendment); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330, 1337 (D.C. Cir. 1985) (cable's "activities of transmitting and packaging programming mandate that it receive First Amendment protection").

[37] Petitioners do not claim that the court of appeals decision directly impacts the cable franchising process, but only state that the opinion below "invites litigation" challenging provisions of the recently-enacted Cable Communications Policy Act of 1984) (47 U.S.C. §§ 531, 532) that authorize franchising authorities to establish access channels for public, educational, and governmental use, and requiring that additional channels be set aside for commercial access. However, the court explicitly distinguished cable access rules from the must carry regulations, noting that the former "serve countervailing First Amendment values by providing a forum for public or governmental authorities . . . ." (Pet. App. 38a-39a).

mentally accelerate the number and frequency of those challenges is no basis for review.

IV. THE LOWER COURT DID NOT ERR IN VACATING THE MUST CARRY RULES, PARTICULARLY WHERE IT HAS AFFORDED THE FCC AN OPPORTUNITY TO RECRAFT THE RULES IN A MANNER CONSISTENT WITH THE FIRST AMENDMENT.

Finally, petitioners fault the court of appeals for failing to leave unconstitutional regulations in effect until the agency itself could revisit those rules. (Pet. 21-23). Petitioners claim that the court of appeals conducted its own rulemaking, found facts, and made final policy judgments. That is patent nonsense. The court determined on the basis of the record before it that the must carry rules, based on nothing more than intuition and instinct (Pet. App. 47a-52a), were a "fatally overbroad" intrusion on the First Amendment rights of cable programmers, operators and viewers (Pet. App. 53a) (citation omitted). Under those circumstances, the court properly voided the rules rather than remand the case to the Commission for additional proceedings while the rules remained in effect. The latter course would have worked irreparable injury on cable programmers, operators, and viewers by perpetuating the abridgment of their First Amendment rights.[38]

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[38] *See Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) ("the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); *Cate v. Oldham*, 707 F.2d 1176, 1188-89 (11th Cir. 1983) (no need to prove "chill" on exercise of First Amendment rights in order to show irreparable injury); *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981) (where constitutional right threatened or impaired, irreparable injury found); *Johnson v. Bergland*, 586 F.2d 993, 995 (4th Cir. 1978).

Nor is a remand to the agency required in this case, as petitioners imply. As this Court has recognized, "[u]nder 28 U.S.C. § 2106 [the Supreme Court or any other court of appellate jurisdiction]

Petitioners also allege that the lower court's opinion is rife with factual and judgmental errors that could have been avoided had the court remanded this case to the expert agency for further proceedings.[39] (Pet. 21-24). Petitioners argue that this evidence of purported judicial overreaching by the court of appeals "warrant[s] examination by this Court." (Pet. 21). Petitioners' argument ignores the court's explicit invitation to the Commission to "recraft the [must carry] rules in a manner more sensitive to . . . First Amendment concerns." (Pet. App. 60a). Should petitioners desire a "full-fledged agency rulemaking" in which the expert

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ha[s] power to dispose of [a] case 'as may be just under the circumstances' ". *Grosso v. U.S.*, 390 U.S. 62, 71 (1968). Thus, the court of appeals did not err in refusing to remand this protracted litigation to the FCC. It is well settled that "[e]ffective judicial administration" in many instances requires that an appellate court dispose of a matter, rather than remand for further consideration. *E.g., Levin v. Mississippi River Fuel Corporation*, 386 U.S. 162, 170 (1967). This is particularly the case where, as here, the outcome of any further consideration by the agency can go in only one direction. *E.g., Bigelow v. Virginia*, 421 U.S. 809, 827-28 (1975) (Supreme Court found it need not remand case to state court where Supreme Court balances First Amendment interests at stake and finds that state court erred in constitutional analysis).

[39] Among the lower's courts alleged errors is the inability to "appreciate the interrelationship between FCC regulatory and copyright issues." (Pet. 24). As the court of appeals correctly recognized, however, nothing in its decision conflicts with the current copyright scheme. (Pet. App. 41a-42a n.42).

Petitioners suggest that enactment of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.*, somehow mandates that must carry and compulsory licensing of secondary transmissions must live or die together. (Pet. 24 n.24). However, the Senate Committee Report cited by petitioners in an attempt to support this point is not part of the official legislative history of the Cable Act. *See* 130 Cong. Rec. S14285 (daily ed. Oct. 11, 1984) (remarks of Sen. Packwood), H12235 (daily ed. Oct. 11, 1984) (remarks of Rep. Wirth). The Cable Act itself addresses neither the must carry rules nor the copyright law.

agency can "find[] facts, assess[] industry trends, and resolv[e] various judgmental issues" in an effort to formulate must carry rules that can pass constitutional muster (Pet. 21), the Commission is free to conduct such a proceeding. Review by this Court is unnecessary in order to provide that opportunity.

Perhaps no stronger evidence of that conclusion exists than the FCC's recently-expressed willingness to reopen the must carry matter. As the Chairman of the Commission has made clear,

> [W]e never intended our statement [announcing a decision not to appeal the lower court's opinion] to preclude any party from coming forward with a proposal which would include a set of carefully crafted mandatory carriage rules, and a clear justification of the policy aims and constitutionality of such rules.[40]

Indeed, the Commission has received three such proposals submitted on behalf of a number of the petitioners, requesting the FCC to "issue a notice of proposed rule making contemplating adoption of new, tailored rules to replace its recently vacated 'must carry' rules." [41] Hence, even petitioners recognize that the court of appeals has not superseded or foreclosed the Commission from reconsidering the must carry issue, if the FCC decides that to do so is in the public interest.

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[40] Letter from Hon. Mark Fowler to Senator Barry Goldwater, September 24, 1985.

[41] *In the Matter of Adoption of New Local Carriage Rules for Cable Television Systems, Joint Petition for Rule Making* (filed Oct. 4, 1985, on behalf of National Association of Broadcasters; Assn. of Maximum Service Telecasters; Station Representatives Association; American Broadcasting Companies, Inc.; CBS Inc.; National Broadcasting Company, Inc.; ABC Affiliates Association; Spanish International Communications Corp. *et al.*; and National Religious Broadcasters), at i. *See also In the Matter of Cable Television Carriage of Television Broadcast Signals, Petition for*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Rulemaking (filed Oct. 4, 1985, on behalf of Association of Independent Television Stations, Inc.) (requesting the Commission "to institute rulemaking proceedings for the regulation of cable television carriage of television broadcast signals"); *Joint Petition for Rulemaking of the Corporation for Public Broadcasting, the National Association of Public Television Stations and the Public Broadcasting Service* (filed Oct. 15, 1985).

Supreme Court, U.S.
FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

QUINCY CABLE TV, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN OPPOSITION

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QUESTIONS PRESENTED

The court below held that the Federal Communications Commission's "must carry" rules, which required cable television operators to carry on their systems all local television stations, were "fundamentally at odds with the First Amendment." Although the FCC has decided not to seek review of the decision, a number of broadcasters and their representatives have petitioned this Court for a writ of certiorari. The questions presented for review are:

1. Do cable systems, in the production of programming and the selection of broadcast signals, satellite-delivered program services, locally originated programming, and other program material to be offered on their channels to subscribers, engage in editorial discretion that is protected by the First Amendment?

2. Did the court below correctly conclude that—even under the lenient First Amendment standards that apply to mere incidental restraints on protected speech, and even assuming that the FCC's asserted purpose for the must carry rules was a substantial governmental interest—the FCC had failed to demonstrate that the rules in fact furthered their intended purpose and that the rules were, in any event, "grossly overinclusive" and "insufficiently tailored to justify their substantial interference with First Amendment rights"?

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BRIEF FOR RESPONDENT NATIONAL CABLE TELEVISION ASSOCIATION, INC. IN OPPOSITION

The National Cable Television Association, Inc. ("NCTA"), respectfully submits this brief in opposition to the Joint Petition for Writ of Certiorari filed by a number of broadcasters and their representatives ("Broadcasters"). NCTA is the principal trade association representing cable television operators in the United States.[1] Its members operate more than 2,100 cable systems serving more than 70 percent of the nation's approximately 40 million cable television subscribers. NCTA was an intervenor in the proceedings below and is, therefore, a respondent in this proceeding.

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[1] NCTA has no parent companies, subsidiaries or affiliates.

STATEMENT OF THE CASE

On July 19, 1985, a panel of the United States Court of Appeals for the District of Columbia Circuit unanimously held that the Federal Communications Commission's "must carry" rules, which generally required cable television systems to retransmit the signals of all television stations that were "significantly viewed" or otherwise deemed "local" by the FCC, were "fundamentally at odds with the First Amendment and, *as currently drafted*, can no longer be permitted to stand."[2] The court found that the rules interfered with cable operators' editorial discretion in the selection of the programming to be transmitted on their channels and that, even under the most lenient of First Amendment standards, the FCC had completely failed to demonstrate that this infringement was necessary or sufficiently tailored to serve a substantial interest. Accordingly, in resolving the two specific cases on review, the court reversed the FCC's orders (1) imposing a fine on Quincy Cable TV, Inc. for failure to comply with the must carry rules and (2) denying Turner Broadcasting System, Inc.'s petition for a rulemaking proceeding to reconsider and delete the existing must carry rules in light of their effect on First Amendment rights.

On August 2, 1985, the FCC, "after much thought about the role of the must carry rules in the mass media marketplace today,"[3] decided not to seek rehearing or Supreme Court review of the decision and indicated that it would decline the Court of Appeals' invitation to attempt, *sua sponte*, "to redraft the rules in a manner more sensitive to . . . First Amendment concerns."[4] Its Chair-

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[2] Slip Opinion, reprinted in Petitioners' Appendix ("Pet. App.") at 8a (emphasis added).

[3] Public Notice, Aug. 2, 1985 (Statement of Chairman Fowler and Commissioners Dawson and Patrick), Pet. App. at 138a.

[4] Slip Opinion, Pet. App. at 60a.

man has made clear, however, that, the FCC "never intended . . . to preclude any party from coming forward with a proposal which would include a set of carefully crafted mandatory carriage rules, and a clear justification of the policy aims and constitutionality of such rules." [5] The FCC would, according to the Chairman, "carefully consider any such petition" in a full rulemaking proceeding.[6] Several of the petitioners in this proceeding are among those who have subsequently filed petitions asking the FCC to institute such a proceeding.[7]

Meanwhile, making no effort to obtain rehearing either by the three-judge panel or by the full Court of Appeals, the Broadcasters asked the Court of Appeals to stay issuance of its mandate pending disposition of the petition for certiorari that they intended to file in this Court. On September 3, 1985, the Court of Appeals denied the Broadcasters' motion.[8] The Broadcasters were similarly unsuccessful in obtaining a stay from the Chief Justice,[9] and the Court of Appeals issued its mandate on September 10, 1985.

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[5] Letter from Chairman Mark S. Fowler to Senator Barry Goldwater (September 24, 1985).

[6] *Id.*

[7] Three such petitions have been filed by: (1) the National Association of Broadcasters, Association of Maximum Service Telecasters, Station Representatives Association, American Broadcasting Companies, Inc., CBS, Inc., National Broadcasting Company, Inc., ABC Television Affiliates Association, Spanish International Communications Corporation, Bahia de San Francisco Television Company, the Seven Hills Television Company, and National Religious Broadcasters; (2) the Association of Independent Television Stations, Inc.; and (3) the National Association of Public Television Stations, the Public Broadcasting Service, and the Corporation for Public Broadcasting.

[8] *Order* (Sept. 3, 1985).

[9] *Order* (Sept. 9, 1985).

ARGUMENT

This is not an appropriate case for review by this Court. First, the decision below, which is carefully limited to the must carry rules "in their current form," [10] properly applies well-established First Amendment principles and raises no novel constitutional issues. Second, the decision is not, as the Broadcasters contend, "inconsistent with the result reached in several decisions of this Court"; [11] this Court has never upheld the constitutionality of the must carry rules or held that cable's protected exercise of editorial discretion is limited to the retransmission of *non-broadcast* programming. Third, the decision below does not create a conflict among the circuits.

Finally, the agency whose rule has been invalidated is not seeking review of the decision below. While the Broadcasters accuse the court below of second-guessing the FCC's supposed determination that the existing must carry rules were "the minimum measures necessary" [12] to protect important policy objectives, the FCC has obviously concluded that those rules are not at all crucial to its task of furthering the public interest.

I. The Decision Below Properly Applies First Amendment Principles and Standards Established by this Court and Raises No Novel Constitutional Issues.

The Court of Appeals held that the must carry rules infringe fundamental First Amendment rights because they interfere with the editorial discretion of cable operators in selecting the programming to be transmitted to subscribers on their systems. Moreover, the rules give preferential treatment and, in some cases, "an overwhelming competitive advantage" [13] to one group of

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[10] Slip Opinion, Pet. App. at 60a.

[11] Petition at 12.

[12] Petition at 20.

[13] Slip Opinion, Pet. App. at 36a.

speakers—local broadcasters—at the expense of non-broadcast cable programmers.

That such effects would be held by this Court to constitute serious infringements of First Amendment rights is indisputable. In cases involving both newspapers and broadcasters. the Court has emphasized the fundamental protection that the First Amendment affords to the exercise of editorial discretion—the "selection and choice of material" to be provided by the media.[14] And in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979), the Supreme Court made clear that cable operators also exercise "a significant amount of editorial discretion regarding what their programming will include." [15]

The Court's decisions generally indicate that intrusions on the editorial discretion of the media are not merely "incidental" restrictions on speech but constitute direct suppression of speech. Such restrictions are generally

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[14] *Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 124 (1973). *See also Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper . . . constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.")

[15] The Court of Appeals accurately described the evolution of cable's editorial role:

> Although in cable's infancy cable operators served exclusively as passive conduits of broadcast signals, their editorial role has expanded dramatically over the course of the industry's brief history . . . . [O]perators now select from "a rich variety" of additional options, including locally originated cablecasts, and the programming of over 40 independent cable networks, which offer such diverse fare as movies, sports, news, live coverage of public events, and specialized presentations aimed at individual segments of the national audience.

Slip Opinion, Pet. App. at 37a-38a.

impermissible and can only be justified by a "compelling" state interest, such as national security. The so-called *O'Brien* balancing test—under which a regulation that has only an incidental impact on speech is permissible if "it furthers an important or substantial governmental interest and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest" [16]—does not generally apply to constraints on editorial discretion.

As the Court of Appeals pointed out,

> [i]n *Miami Herald* [*Publishing Co. v. Tornillo*, 418 U.S. 241 (1974)], the Court faced a constitutional challenge to a Florida statute that required newspapers to grant a right to reply to political candidates attacked in earlier editions. *Without so much as alluding to even the possibility of a subordinating governmental interest*, the Court invalidated the statute. Forcing an editor to print that which he otherwise would not, the Court held, was a restraint the First Amendment simply would not tolerate.[17]

Therefore, the Court of Appeals had "serious doubts about the propriety of applying the standard of review reserved for incidental burdens on speech" [18] and would have been well within the ambit of Supreme Court precedents had it applied a more stringent standard.[19] The court did not, however, reach the fundamental question

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[16] *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

[17] Slip Opinion, Pet. App. at 39a-40a (emphasis added).

[18] *Id.* at 39.

[19] In addition to their intrusion on editorial discretion, the must carry rules also infringe First Amendment rights insofar as they favor one class of speakers (local broadcasters) over others (cable programmers). This, too, is more than a mere incidental infringement. As this Court held in *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), "the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment."

of which standard to apply because it found that, even under the less restrictive *O'Brien* test—and even assuming that the FCC's asserted interest in "preserving free, locally-oriented television" [20] was sufficiently substantial [21] —the rules were clearly impermissible.

The Broadcasters argue that, in applying the *O'Brien* test, the Court of Appeals acted as a "super-agency" and "substitute[d] its judgment concerning the appropriateness of" the must carry rules.[22] But this is hardly a case of the Court of Appeals second-guessing or encroaching on the expertise of an agency. The court invalidated the must carry rules because the FCC failed to make even a minimal showing that those rules were necessary or effective in promoting their intended objective.

The court found, first, that the Commission had "failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and,

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[20] Slip Opinion, Pet. App. at 41a. In its brief in the Court of Appeals, the FCC asserted that the "paramount public interest" underlying the rules was "the preservation of free local television service," FCC Brief at 41 (July 25, 1984), and that their purpose was "to insure that cable television systems distribute television signals and other services to the American public without *destroying or endangering* the basic television broadcast service which has been developed under the Communications Act of 1934." *Id.* at 16 (emphasis added).

[21] *See* Slip Opinion, Pet. App. at 41a-42a:

> The Commission contends that the must-carry rules serve the interest of preserving free, locally-oriented television. The difficult question whether, taken as an abstract proposition, that interest is sufficiently weighty to warrant the rules' interference with First Amendment rights must await resolution in another case. For even if we accept the common wisdom that the goal of encouraging 'localism' qualifies as 'important or substantial,' *United States v. O'Brien, supra,* 391 U.S. at 377, we would be unable to find that the FCC has carried its heavy burden of justification.

[22] Petition at 21.

more particularly, that the must carry rules in fact serve to alleviate that threat." [23] This was not a close call. As the court demonstrated, the FCC had mustered no evidence at all to support the need for, or effectiveness of, the rules:

> In the two decades since the rules' original promulgation, the Commission has never seriously examined any of the admittedly speculative links in the chain of reasoning advanced in support of the rules. In particular, it has never sought support for the assumptions that are the linchpins of its analysis: (1) that without protective regulations cable subscribers would cease to view locally available off-the-air television either because they would disconnect their antennas or because the inconvenience of a switching device would deter them; and (2) that even if some cable subscribers did abandon local television, they would do so in sufficient numbers to affect the economic vitality of local broadcasting.[24]

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[23] Slip Opinion, Pet. App. at 51a.

[24] *Id.* at 48a. The court might also have added that the Commission never even demonstrated that, in the absence of must carry rules, cable operators would be likely to drop a significant number of local broadcast signals. Indeed, there is no reason to expect any wholesale reordering of the status quo now that the rules are gone. With or without the must carry rules, cable operators will continue to carry most local broadcast signals. Local broadcast signals command a major share of cable subscriber viewership nationwide. Therefore, cable operators have every economic incentive to continue carriage of those signals and no incentive to undertake a restructuring of the broadcast-cable relationship.

Although some broadcast stations undoubtedly will be removed from cable systems, these will generally be stations that simply duplicate network programming available on another local station or that have little appeal to cable subscribers. This is most likely to occur where the cable system's channel capacity is fully utilized and the cable operator chooses to replace the must carry station with other programming that is more attractive to subscribers or that is otherwise desirable, for non-economic reasons, in the operator's editorial judgment.

Second, the court found, with equal ease, that even if the must carry rules could be viewed as furthering the substantial governmental interest of preserving local broadcasting, the rules, in their existing form, had a far more extensive impact on protected speech than could conceivably be justified or required by that interest. The court "stress[ed] that '[w]e are not quibbling over fine-tuning' . . . . [I]t is difficult to imagine a less discriminating or more overinclusive means of furthering the Commission's stated objectives." [25] As the court pointed out,

> [t]he rules indiscriminately protect each and every broadcaster regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operator. The 18th station is entitled to carriage no less than the first even if its programming is virtually duplicative of the viewing fare already transmitted over the cable system. Indeed, it is entitled to carriage even if it carries no local programming at all'.[26]

In sum, the Court of Appeals had no difficulty determining that, even under the *O'Brien* test—a test more tolerant of First Amendment intrusions than that which the Supreme Court typically applies in cases involving interference with editorial discretion of the media—the must carry rules could not be upheld. This was not, as the Broadcasters suggest, a sweeping constitutional holding "extending Tornillo's condemnation of 'coerced speech' to virtually any regulation affecting a cable television operator's control over the use of cable channels." [27] It was simply a finding, with respect to these particular rules, that the Commission had "failed entirely to deter-

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[25] *Id.* at 53a, quoting *FEC v. Nat'l Conservative Political Action Comm.*, 105 S. Ct. 1459, 1471 (1985).

[26] *Id.* at 54a (footnotes omitted).

[27] Petition at 16.

mine whether the evil the rules seek to correct 'is a real or merely a fanciful threat,' " [28] and that the rules in any event, are " 'grossly' overinclusive" [29] and "insufficiently tailored to justify their substantial interference with First Amendment rights." [30]

The Broadcasters do not attempt to rebut the court's dispositive findings. They do not point to any evidence that the must carry rules are necessary to the viability of local broadcasting, and they offer no answer at all as to why the rules should provide guaranteed carriage to all local broadcasters, "regardless of the quantity of local service available in the community and irrespective of the number of local outlets already carried by the cable operators." [31]

Indeed, in their recently filed joint petition for rulemaking at the FCC, the National Association of Broadcasters, Association of Maximum Service Telecasters and other broadcasters essentially concede that the FCC's policy objectives could be achieved with rules that were "more narrowly and flexibly drawn." [32] While seeking to persuade this Court that the decision below leaves the FCC "virtually helpless" [33] in seeking to ensure that cable television does not threaten the viability of local broadcasting, the Broadcasters have assured the FCC that "[t]he *Quincy Cable* decision provides room for new rules which satisfy the Court's constitutional objectives while accomplishing Commission aims, benefiting viewers and

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[28] *Id.* at 60a, quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 50 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

[29] *Id.* at 54a, quoting *Home Box Office, Inc. v. FCC, supra*, 567 F.2d at 50.

[30] *Id.* at 60a.

[31] *Id.* at 54a.

[32] Petition for Rulemaking, *supra* note 7, at iv.

[33] Petition at 12.

accommodating the essential concerns of broadcasters and cable operators." [34] If, as the unanimous court found, and as the Broadcasters seem to concede, the rules were neither necessary nor narrowly tailored to achieve the FCC's asserted policy objectives, then their intrusion on editorial discretion was unwarranted under the First Amendment standards set forth by this Court.

II. The Decision Below Is Not in Conflict with Previous Decisions of this Court Regarding Cable Television.

Instead of coming to grips with the fundamental flaws and excesses of the must carry rules, the Broadcasters argue that the court's decision somehow conflicts with decisions of this Court. No such conflict exists.

The Broadcasters attempt, first, to show that this Court has already found the must carry rules to be consistent with the First Amendment. But in none of the cases cited by the Broadcasters did the Court even consider the constitutionality of the rules. As the Court of Appeals correctly pointed out, the issue in the Supreme Court cases cited by the Broadcasters was the scope of the FCC's *statutory jurisdiction*, under the Communications Act of 1934, as amended,[35] to impose regulations on cable television systems:

> On several occasions the Supreme Court has addressed questions concerning the breadth of the FCC's jurisdiction over cable television. *See United States v. Southwestern Cable Co.*, [392 U.S. 157, 178 (1968)] (generally approving FCC jurisdiction over cable if 'reasonably ancillary' to its regulation of broadcast television); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) (*Midwest I*) (finding rule requiring cable operators to originate local programming within FCC's jurisdiction); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (*Mid-*

[34] Petition for Rulemaking, *supra*, at 18.

[35] 47 U.S.C. §§ 151 *et seq.*

> *west II*) (striking down as beyond the FCC's jurisdiction rules requiring cable operators to make channels available for local access). *See also Capital Cities Cable, Inc. v. Crisp, supra*, 104 S. Ct. 2694 (discussing federal preemption of state laws regulating cable).[36]

The notion that this Court, in ruling on the FCC's statutory jurisdiction to adopt certain cable regulations, was also implicitly deciding the constitutionality of the regulations encompassed by that jurisdiction is wholly at odds with the Court's general policy of not deciding constitutional issues whenever it can resolve a case on non-constitutional grounds.[37] Indeed, the Court of Appeals addressed and effectively rebutted the argument that, in the cases cited by the Broadcasters, the Court found the must carry rules to be constitutionally permissible:

> In *Southwestern Cable* the Court explicitly disclaimed reaching any question concerning the validity of the FCC's cable rules. 392 U.S. at 167. In *Midwest I* the plurality opinion suggested in a footnote that the Eighth Circuit had correctly upheld the validity of several cable regulations. 406 U.S. at 659 n.17. However, the context of the reference makes clear that the plurality meant to suggest merely that the Eighth Circuit had correctly held that the particular rules at issue were within the standard set out in *Southwestern Cable* for testing the reach of the FCC's jurisdiction. In any event, as the *Midwest II* Court later acknowledged, the plurality's footnote in *Midwest I* was pure 'dicta.' 440 U.S. at 697 n.7. Indeed, the *Midwest II* Court, though not reaching any constitutional questions implicated by the particular regulations before it, de-

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[36] Slip Opinion, Pet. App. at 18a-19a.

[37] *See, e.g., City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294 (1982).

scribed those questions as 'not frivolous.' 440 U.S. at 709 n.19.[38]

Second, the Broadcasters argue that the Court of Appeals' holding that cable operators exercise editorial discretion in selecting program services to fill their channels is at odds with two copyright decisions of this Court—*Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting Systems, Inc.*, 415 U.S. 394 (1974). Those two cases held that, for purposes of the now obsolete Copyright Act of 1909,[39] the retransmission of broadcast signals by cable operators was not a "performance" of copyrighted works and therefore was not subject to copyright liability. Retransmission of broad-

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[38] *Id.* at 19a n.20. In *Capital Cities Cable, Inc. v. Crisp*, 104 S. Ct. 2694 (1984), the Court found that it was within the FCC's jurisdiction to regulate—and to preempt state and local regulation of—signal carriage. Because an Oklahoma statute prohibiting carriage of wine and liquor advertising had the effect of preventing cable systems in Oklahoma from carrying certain out-of-state broadcast stations (some of which were required to be carried by the must carry rules) on their systems, the Court held that the prohibition was in conflict with the FCC's general preemption of signal carriage regulation and also with the must carry rules and was therefore invalid. The Court, however, specifically disavowed any implications regarding the constitutionality of the must carry rules:

> Relying upon the Court's decision in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979), respondent contends that the FCC rules and regulations reflecting the agency's intent to pre-empt all state regulation of cable signal carriage violate the First Amendment rights of cable operators by depriving them of editorial control over the signals they carry, and therefore may not be invoked as a basis for pre-emption. *We need not consider the merits of this claim*, however, since respondent plainly lacks standing to raise a claim concerning his adversaries' constitutional rights in a case in which those adversaries have never advanced such a claim.

104 S. Ct. at 2701 n.6 (emphasis added).

[39] *See* 17 U.S.C. §§ 1 *et seq.* (1976).

cast signals did not have copyright implications, according to the Court, because "[w]hen a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing the contents of that program." [40] The Court rejected the argument that "[b]y choosing among alternative broadcasting stations," cable operators were exercising sufficient choice and selection to become "performers" for copyright purposes.[41]

The Broadcasters contend that these decisions constitute a finding that cable operators, in selecting broadcast signals for carriage, are "akin to a mere carrier or conduit of expression" [42] and do not exercise editorial discretion. But whatever the merits of such a contention at the time of the Court's decisions, any such interpretation has, in light of the subsequent evolution of cable television, been repudiated by this Court. By 1979, this Court had concluded, in *FCC v. Midwest Video*, *supra*, that cable operators do exercise a significant degree of editorial discretion not only with respect to non-broadcast programming but also with respect to the retransmission of particular broadcast signals:

> As the Commission, itself, has observed, '*both in their signal carriage decisions and* in connection with their origination functions, cable television systems are afforded considerable control over the content of the programming they provide.' [43]

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[40] *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394, 409 (1974).

[41] *Id.*

[42] Petition at 11.

[43] 440 U.S. at 707, quoting *Report and Order in Docket No. 20829*, 69 F.C.C.2d 1324, 1333 (1978) (emphasis added) (footnote omitted). Indeed, Congress itself acted quickly to reverse any implication in this Court's decision in *Teleprompter* that cable operators should, for copyright purposes, be viewed as mere conduits for the retransmission of broadcast signals. Under Section 111 of the Copyright Act of 1976, 17 U.S.C. Sec. 111, the retransmission of

III. There Is No Conflict Among the Circuits.

The Broadcasters also contend that the decision below "is in direct conflict with several decisions by other federal Courts of Appeals." [44] The only case cited by the Broadcasters that specifically upheld the must carry rules is *Black Hills Video Corp. v. FCC*, 399 F.2d 65 (8th Cir. 1968)—a case decided when, as the Court of Appeals noted, "cable was in its infancy and apocalyptic visions of its impact were common." [45]

In 1968, the cable operator's editorial function had not yet developed or been recognized by the courts. It was not until 1975 that Home Box Office "revolutionized the cable industry by launching the satellite delivery of its programming service," [46] spawning the wide variety of programming alternatives that now exist, and not until 1979 that this Court explicitly recognized the editorial function performed by cable operators.[47] Indeed, it was not until the 1970's that this Court made clear that the exercise of editorial discretion by all media required strict First Amendment protection.[48]

It is difficult to imagine that the Eighth Circuit would, in light of these subsequent developments, reaffirm its decision in *Black Hills Video Corp. v. FCC*. Indeed, by 1978 the Eighth Circuit had recognized, in *Midwest*

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broadcast signals is specifically treated as a public performance, for which copyright licensing is required. *See Capital Cities Cable, Inc. v. Crisp, supra*, 104 S. Ct. at 2705-06.

[44] Petition at 14.

[45] Slip Opinion, Pet. App. at 19a.

[46] Report of the Committee on Energy and Commerce, H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 21 (1984).

[47] *FCC v. Midwest Video Corp., supra*, 440 U.S. at 707.

[48] *See, e.g., Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., supra*; *Miami Herald Publishing Co. v. Tornillo, supra.*

Viedo Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979), that cable television had evolved into a communications medium with First Amendment rights approximating those of the print media. Citing *Miami Herald Publishing Co. v. Tornillo*, *supra*, the Court found that the FCC's rules requiring cable operators to set aside channels for public access impermissibly infringed First Amendment rights because they

> strip[ped] from cable operators, on four of their channels, all rights of material selection, editorial judgment, and discretion enjoyed by other private communications media, and even by the 'semi-public' broadcast media.[49]

The Broadcasters' argument that *Black Hills Video* stands today as an indication of a conflict between the D.C. Circuit and the Eighth Circuit is, therefore, groundless.[50]

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[49] 571 F.2d at 1055-56.

[50] For similar reasons, the Ninth Circuit's decision in *Great Falls Community TV Cable Co. v. FCC*, 416 F.2d 238 (9th Cir. 1969), which rejected, in summary fashion, a First Amendment challenge to FCC rules requiring cable operators to delete the signals of distant broadcast stations whose network programming duplicated the programming of local stations, does not evidence a conflict between the circuits. In a recent decision, the Ninth Circuit specifically recognized that "cable technology has . . . evolved significantly since the time of *Black Hills Video*" and that "*Black Hills Video*, therefore, is a doubtful precedent today." *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1404 (9th Cir. 1985), *jurisdictional statement filed*, 54 U.S.L.W. 3170 (U.S. Sept. 24, 1985) (No. 85-390). The Ninth Circuit's current view of cable's First Amendment status echoes that of the D.C. Circuit:

> In addition to originating their own programming, cable television operators exercise considerable editorial discretion regarding what their programming will include . . . . Editorial judgment is entitled to First Amendment protection . . . . Undeniably, cable operators do transmit programs produced by others. To the extent an operator does so, however, we believe

Indeed, there is no longer any doubt or disagreement among any of the circuits that cable is a medium whose speech is protected by the First Amendment.[51] There is, to be sure, some disagreement as to the extent to which their First Amendment status immunizes cable operators from franchise regulations that do not directly affect program content and editorial discretion.[52] But there is no conflict with the decision of the Court of Appeals that the must carry rules interfere with editorial discretion.

> it would be treated for First Amendment purposes as would be theater owners, booksellers, and concert promoters. Their First Amendment protection is not diminished because they distribute or present works created by others.

Id. at 1410 n.10.

The Broadcasters' assertion that "*Black Hills* was cited with approval" by the Tenth Circuit in *Community Communications Co. v. City of Boulder*, 630 F.2d 704, 713 (10th Cir. 1980), Petition at 14 n.15, is not simply misleading; it is false. What the Broadcasters have cited is the dissenting opinion of Judge Markey. In that opinion, Judge Markey does, indeed, note that the *city* had cited *Black Hills Video* to support its argument that restrictions on a cable operator's right to expand his service area did not violate the First Amendment. Judge Markey found the City's reliance on *Black Hills Video* to be misplaced. The majority, meanwhile, did not reach the First Amendment issues and did not cite *Black Hills Video* at all, much less "with approval."

[51] *See, e.g., Preferred Communications, Inc. v. City of Los Angeles, supra*; *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1415 (D.C. Cir. 1985); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982); *Community Communications Co., Inc. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981); *Midwest Video Corp. v. FCC*, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979); *Home Box Office, Inc. v. FCC, supra.*

[52] *Compare Preferred Communications, Inc. v. City of Los Angeles, supra* and *Tele-Communications of Key West, Inc. v. United States, supra, with Omega Satellite Products v. City of Indianapolis, supra*, and *Community Communications Co., Inc. v. City of Boulder, supra.*

And there is no conflict with the court's determination that even under the *O'Brien* test, the rules could not survive because the Commission's asserted rationale for the rules had no support and because the rules suppressed far more speech than was conceivably necessary to achieve the Commission's stated objectives. Given this absence of evidentiary support and disparity of means and ends, it is hard to imagine how the must carry rules could have survived any court's First Amendment scrutiny.

IV. The FCC Is Not Seeking Review of the Decision Below.

This is not a case in which a longstanding rule that a federal agency believes to be essential to its public interest objectives has been invalidated. The FCC, in deciding not to pursue review of the decision below, has recognized that the specific must carry rules that it adopted 20 years ago are no longer necessary or appropriate. Even if the court's decision were to be reversed, it is improbable that the FCC would reinstate the rules without significantly narrowing their scope and effect.

The FCC agreed with the Court of Appeals that the rules had "displaced consumer choice in many cases and so interfered with the marketplace." [53] The FCC also endorsed the decision as "a positive step toward recognizing full First Amendment protection for all forms of electronic media." [54] And, while expressing its preference that elimination of the must carry rules be accompanied by elimination of the compulsory copyright license for retransmission of broadcast signals, the FCC's majority nowhere suggested that it still viewed the rules as necessary to the preservation of local broadcasting. Indeed,

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[53] Public Notice, *supra*, Pet. App. at 138a.

[54] *Id.*

even Commissioner Quello, in dissenting from the FCC's decision not to appeal the court's decision, conceded that the must carry rules should, in any event, "be revisited to address legitimate concerns raised by the court," and he "favor[ed] a Notice of Proposed Rulemaking to do just that." [55]

Thus, whether or not the decision below is reviewed by this Court, the likely outcome is the same—a rulemaking proceeding aimed at reassessing whether must carry rules are necessary to promote any public policy interest and, if so, at revising the rules to ensure that their impact on cable operators' editorial discretion is no greater than necessary to achieve the FCC's objectives. In these circumstances, review is unnecessary and inappropriate.

CONCLUSION

For the foregoing reasons, the Writ should be denied.

Respectfully submitted,

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[55] Dissenting Statement of Commissioner James H. Quello, Pet. App. at 140a.

Supreme Court, U.S.
FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

QUINCY CABLE TV, INC., *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT QUINCY CABLE TV, INC. IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

Those Questions Presented by the Joint Petition are argumentative and evasive of the issues. The questions presented are:

1. Whether FCC regulations which, upon private-party demand, mandate distribution and exhibition of the programming and commercial advertising messages broadcast by designated television stations over respondent's cable television system, a causal effect of which is displacement and exclusion of other preferred, available communications sources and information, exceed the constraint imposed, or unlawfully abridge freedoms protected, under the speech and press clause of the First Amendment to the U.S. Constitution.

2. Whether FCC regulations which compel that respondent's cable television system, without compensation, dedicate a significant portion of its limited channel capacity and electronic distribution facilities to exhibition of the programming and commercial announcements of prescribed television broadcast stations, upon demand of the station licensees, constitute a taking of respondent's property in contravention of the due process clause of the Fifth Amendment to the U.S. Constitution.

The court below resolved the first Question in the affirmative and declined to address the second as then unnecessary to resolution of the case.

LIST OF PARTIES

Respondent here and a petitioner in the court below, Quincy Cable TV, Inc., is a corporation of the State of Washington, the stock of which is wholly owned by a husband and wife. Quincy Cable has no subsidiaries and its sole business is ownership and operation of a cable television system in the Town of Quincy, Washington.

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Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENT QUINCY CABLE TV, INC. IN OPPOSITION TO PETITION

Respondent Quincy Cable TV, Inc., owner and operator of a cable television system and the petitioner below in Case No. 83-1283, opposes the Joint Petition of National Association of Broadcasters, *et al.*

OPINIONS BELOW

Since the filing of the Joint Petition, the opinion of the court below has been reported in 768 F.2d 1434 (D.C. Cir. 1985).

STATEMENT OF THE CASE

Petitioners accord but one brief paragraph (Joint Petition, p. 6) to the cable television operations conducted by respondent Quincy Cable and altogether avoid the context in which the must-carry regulations of the Federal Communications Commission ("FCC") were applied by the agency to require full-time carriage of three commercial broadcast television stations licensed to Spokane, Washington in circumstances where Quincy Cable and those persons residing in the Town of Quincy, had expressed their preference for access to other, diverse communications over the cable system's limited distribution facilities. These missing facts will be helpful to the Court's appreciation of the issues.

Those brief facts relating to Quincy Cable are accurately set forth in the opinion of the court below (Slip Op., A., 26a-28a).[1] Quincy, a small town in rural Washington, lies equidistant between Seattle and Spokane being 125 miles from each, and well beyond the direct range of television stations broadcasting from either metropolitan city (Slip Op., A., 26a). Operating a cable television reception and distribution system of limited channel capacity, and serving less than 1000 cable subscribers, Quincy Cable sought to exercise its discretion, consistent with that expressed by its subscribers, to furnish access to a wider diversity of available in-

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[1] References herein to "A." refer to the Appendices to petitioners' Joint Petition with the appropriate page identification. "Slip Op." refers to the opinion of the court below as reprinted in the Joint Petition. "Quincy" followed by a Roman numeral refers to one of the six decisions of the FCC, as reprinted in the Appendix to the Joint Petition, pp. 63a-132a.

formation. Specifically, Quincy Cable proposed to (i) retain carriage of three Seattle commercial network television stations to the west, (ii) delete reception of three duplicating network-affiliated stations broadcasting from Spokane to the east, and (iii) replace the then three vacated channels with three entirely new program services (Slip Op., A., 26a). The three Spokane stations, each the licensee of a VHF television channel, objected before the FCC asserting that the must-carry rules afforded them the right of mandated access to Quincy Cable's distribution lines for exhibition of their commercial speech product.[2]

The FCC held that none of the reasons proffered by Quincy Cable were sufficient to waive its mandatory carriage rules and denied the requested relief (*Quincy I*, A. 75a-77a). Quincy Cable, proceeding then for the first time by legal counsel, sought agency reconsideration both refining its prior factual reasons and making fundamental free speech and due process assertions under the First and Fifth Amendments to the U.S. Constitution claiming a prior restraint on its exercise of editorial discretion in the selection, organization

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[2] The FCC's must-carry rule (47 C.F.R. § 76.57(a)) required cable television systems to carry certain stations "on request of the relevant station licensee" (A., 133a). Thus, the obligation to carry a particular station is invoked at the option of that station licensee, i.e., the rule delegates *discretion* to the licensee as to that speech to be distributed over the cable-television medium. A station licensee's entitlement to carriage is not dependent upon the content or quality of its programming. *See* Slip Op., A. 37a, n. 38 ("religious programming" entitled to must carry). And the rules "required carriage . . . irrespective of the number of must-carry channels already being transmitted, the degree of programming duplication or the channel capacity of a cable system" (*Id.*, A., 13a).

and presentation of information to be distributed over its medium, and a devaluation of its business resulting from compelled occupation of its limited distribution capacity with unwanted programming resulting in subscriber dissatisfaction causing a loss of revenue (*Quincy VI*, A., 128a).[3]

The FCC rejected each and every argument advanced by Quincy Cable, holding, *inter alia*, that stations entitled to must-carry status need show no effort to serve the needs of the cable community (*Quincy II*, A. 82a); "that certain program services which Quincy now carries . . . may allegedly be more popular than the Spokane affiliates is not ground for waiver" (*Quincy VI*, A. 132a); that "[n]either are we persuaded by Quincy's contentions that its obligations to comply with the mandatory signal carriage rules is vitiated because it already carries three network stations on its system, because its subscribers may receive the Spokane translator stations over-the-air on their UHF terminals, or because its subscribers allegedly have no interest in viewing the Spokane signals;"[4] and "that our signal carriage policy provides that mandatory signals have carriage priority over non-mandatory signals" (*Quincy IV*, A., 101a-102a).[5] And

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[3] Cable television systems, like any media business, operate at the economic endorsement of the consumer.

[4] By mandating carriage of *duplicating* programming over cable-system lines, the delivery capacity of which is finite, the FCC rule militates *against* "the widest possible dissemination of information from diverse and antagonistic sources." *Cf. Associated Press* v. *United States*, 326 U.S. 1, 20 (1944).

[5] During the course of the proceedings conducted before the FCC (November 1979 - February 1983), Quincy Cable had expanded the

because of its failure immediately to distribute the Spokane stations as had been directed by an *employee* of the FCC, the FCC imposed a forfeiture in the sum of $5,000 on Quincy Cable (Slip Op., A. 27a). The Town of Quincy was an intervenor in the court below supporting the First Amendment position taken by Quincy Cable.

REASONS FOR DENYING THE WRIT

1. The Issue Of Constitutional Law Was Correctly Treated By The Court Below

The subject Petition for Writ of Certiorari is jointly filed on behalf of numerous intervenors below, all of whom are either licensees or representatives of commercial television broadcast stations that benefit financially from cable carriage pursuant to the FCC's must-carry rules.[6] The fundamental flaw underlying the Joint Petition is that it assumes that broadcast licensees, as First Amendment speakers, are entitled to

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delivery-capacity of its cable system beyond the original 12 channels and offered to carry the three Spokane station signals over the system's "Tier II", an optional level of service to which all of the system's users did not elect to subscribe (Slip. Op. A. 28a n. 28; *Quincy VI*, A. 127a). The FCC, rejecting any such resolution, held that stations entitled under the rule to must-carry status must be carried "on a cable system's basic tier of service" (i.e., that tier to which *all* system users must subscribe). *Quincy VI*, A., 130a. Thus, the rule not only mandates carriage of specified sources but further dictates the manner or order of presentation over the cable medium.

[6] The FCC, the agency that promulgated and enforced those rules, and a respondent below, is not seeking further review of the decision below. Nor is the United States, the other respondent below, a party here. *See* Part 3, *infra*.

uniquely favorable First Amendment treatment because of their status as "privileged occupants of a physically scarce resource," (Slip Op., A., 31a-32a), *i.e.,* the broadcast spectrum. That underlying assumption is wrong; and, indeed, it is the converse theory which this Court has consistently applied. A broadcaster's privileged occupancy of the scarce, limited spectrum justifies and excuses a *diminished* First Amendment status, since "[i] is the right of the viewers and listeners, not the right of broadcasters, which is paramount." *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 390 (1969).[7]

See National Broadcasting Co. v. *United States,* 319 U.S. 190, 226-27, 2140-14 (1943); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 101 (1973) ("Because the broadcast media utilize a valuable and limited public resource there is also present an unusual order of First Amendment values.") "[A]dvantages [of a broadcast license] are the fruit of a preferred position conferred by the Government" (*Red Lion Broadcasting Co., supra,* 395 U.S. at 400) requiring a balancing of the licensee's rights as a "public trustee" (*CBS, supra,* 412 U.S. at 118).

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[7] This Court, albeit in a copyright context, has functionally equated cable television reception and distribution of broadcast signals to that of a television viewer. *Fortnightly Corp.* v. *United Artists,* 392 U.S. 390, 400 (1968) ("The function of CATV systems has little in common with the function of broadcasters. . . . CATV systems receive programs and carry them by private channels to additional viewers" (footnotes omitted)). *See also, Teleprompter Corp.* v. *C.B.S.,* 415 U.S. 394, 408 (1974); and *See Lilly* v. *United States,* 238 F.2d 584, 587 (4th Cir. 1956), (cable service is "a mere adjunct of the television receiving set with which it was connected . . .").

That position advanced below, and now here, by the broadcasting interests is the direct opposite of the "scarcity" theory. For petitioners contend that by virtue of their special status as privileged broadcast licensees entitled to speak via the public's scarce airwaves, they thereby are conferred with a superior First Amendment right *vis-a-vis* that of the viewer or the ordinary citizen, *viz.*, the right to demand that their speech be governmentally preferred over that of all other First Amendment speakers.[8] We are aware of no precedent of this Court condoning a systematic prioritising by government of, or between, fully protected speech sources.[9] *Compare Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976) ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . .").[10]

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[8] Slip Op., A., 37a ("the more certain injury stems from the substantial limitations the rules work on the [cable] operator's otherwise broad discretion to select the programming it offers its subscribers").

[9] The FCC's must-carry mentality, which explicitly "provides that mandatory signals have carriage priority over non-mandatory signals" (*Quincy IV*, A., 102a), is unique and without parallel to any other media application or context.

[10] That case most on point is *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94 (1973), where the Court, at the instance of the broadcasting industry, firmly established the principle of the licensee's "right to exercise editorial judgment" (412 U.S. at 111) and to accord or deny access to its facilities "based on its own journalistic judgment of priorities and newsworthiness" (412 U.S. at 118). Ironically, the broadcaster petitioners here would deny Quincy Cable that same measure of editorial autonomy in selecting those communications for distribu-

A government regulation which, without subtlety, enables one entrepreneur, by simple demand and without charge, to commandeer the facilities of another for purposes of distribution and publication of *commercial* speech would seemingly create presumptive problems under both the First and Fifth Amendments to the Constitution.[11] The Joint Petition does not discuss these fundamental concerns inherent to the "must carry" scheme.[12]

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tion over its wire-line facilities. Where any cable operator *originates* programming it is subject to the identical "fairness" requirements pertaining to a broadcast licensee (47 C.F.R. § 76.209).

[11] *See, e.g.*, Slip Op., A., 37a, n. 37 (applying the must-carry scheme to print media).

[12] Amici here, condemning the opinion below, express the fear that Quincy Cable, or cable systems in generality, are made First Amendment "censors" or "gatekeepers" of that information to be distributed over cable-system lines. On analysis this contention proves a red herring. First, Quincy Cable's services furnish subscribers access to some 12 televison broadcast stations (*Quincy IV*, A., 127a) over which independent signal-sources it exercises *no* power of program supervision or alteration. Further, subscribers obtain access to a wide variety of additional non-broadcast entertainment and information sources (*Id.*). Without Quincy Cable's services, residents of Quincy would be restricted to video access to only the Spokane translator stations (Slip Op., A., 26a, n. 25). And, thus, Quincy Cable is a major contributor to diversity of communications within the community. Admittedly, Quincy Cable, like any media editor (e.g., the television networks or the *New York Times*), exercises substantial discretion in the selection and presentation of those sources for containment in its communications package. The intent and effect of the First Amendment, however imperfect, is to bar *government*, and therefore the FCC, from making those judgments. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech and re-

Licensees of broadcast television stations, like teachers, peace officers, sanitation workers and publishers, generally make a valuable contribu on to the commonweal. But such licensees, however uniquely privileged and economically advantaged by their governmental grant, do not constitute a media elite elevated above the more pedestrian concerns or principles of the Constitution. The particular speech of a broadcaster, commercial or otherwise, is entitled to no more protection or governmental promotion under the First Amendment than that accorded to all speakers. The fundamental fallacy of the must-carry rule, like those arguments of the joint petitioners, is the failure to recognize, or even to consider, these bedrock principles.[13]

2. There Are No Conflicting Decisions Rendered By Other Federal Courts On The Same Issue

Contrary to the assertions of petitioners, there is no conflict among the circuits nor is there any Supreme

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ligion." *Thomas* v. *Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

[13] Joint petitioners finally urge that the D.C. Circuit's "cavalier dismissal of the interrelationship of . . . copyright and regulatory issues" (Joint Pet., p. 24) somehow misled the court in its First Amendment analysis. But as this Court has observed:

> The FCC has consistently contended that it is without power to alter rights emanating from other sources, including the Copyright Act . . . This position is consistent with the terms of the Communications Act of 1934, the source of the Commission's regulatory power. . . .

Teleprompter Corp. v. *C.B.S.*, 415 U.S. 394, 406 n. 11 (1974). The issues before the court below concerned solely an FCC regulation and its administration by the agency; and such questions do not entail considerations of a copyright nature.

Court precedent in conflict with the opinion below. The Eighth Circuit's opinion in *Black Hills Video Corp.* v. *FCC,* 399 F.2d 65 (8th Cir. 1968), petitioners' strongest case in support of their circuit-conflict argument, was repudiated by that same court ten years later. The Eighth Circuit had upheld the FCC's must-carry rules in *Black Hills* on the grounds that "[t]he Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations." 399 F.2d at 69. However, in *Midwest Video Corp.* v. *FCC,* 571 F.2d 1025, 1056 (8th Cir. 1978), *aff'd on other grounds,* 440 U.S. 689 (1979), that same court stated:

> [W]e have seen and heard nothing in this case to indicate a constitutional distinction between cable systems and newspapers in the context of the government's power to compel public access.
>
> If the Commission has any authority to intrude upon the First Amendment rights of cable operators, that authority, as above indicated, is less, not greater than its authority to intrude upon the First Amendment rights of broadcasters.

In a footnote, the Eighth Circuit limited *Black Hills* to its facts. 571 F.2d at 1054, n. 71.[14] Indeed, the opinion below is in complete harmony with the Eighth Circuit's later *Midwest Video* opinion, as well as with the D.C. Circuit's own opinions in *Tele-Communcia-*

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[14] *See also Preferred Communications, Inc.* v. *City of Los Angeles,* 754 F.2d 1396, 1404 (9th Cir. 1985), jurisdictional statement filed No. 85-390 (Sept. 6, 1985) ("*Black Hills Video,* therefore, is a doubtful precedent today").

tions of Key West, Inc. v. *United States,* 757 F.2d 1220 (D.C. Cir. 1985) and *Home Box Office, Inc.* v. FCC, 567 F.2d 9 (D.C. Cir.) (*per curiam*), *cert. denied,* 434 U.S. 829 (1977), and with the Ninth Circuit's opinion in *Preferred Communications, Inc.* v. *City of Los Angeles, supra.* In short, there is no arguable conflict among the circuits.

Nor is there any arguable Supreme Court precedent upholding the constitutionality of the must-carry rules. Although this Court has upheld the FCC's *jurisdiction* over cable television in *United States* v. *Southwestern Cable Co.,* 392 U.S. 157 (1968), and its *preemption* of certain state regulation in *Capital Cities Cable, Inc.* v. *Crisp,* —— U.S. ——, 104 S.Ct. 2694 (1984), it has never purported to consider the constitutionality of the cable must-carry rules.[15] To the extent that a First Amendment challenge to cable regulations has been discussed at all, the issue was termed "not frivolous" by this Court in *FCC* v. *Midwest Video Corp.,* 440 U.S. 689, 709, n. 19 (1979).

There is no dispute here as to the FCC's jurisdiction over cable or its authority to preempt state regulation of signal carriage rules. The *only* decision made by the court below is that the current must-carry rules "are insufficiently tailored to justify their substantial interference with First Amendment rights" (Slip Op., A., 60a). There is no surviving judicial precedent in conflict with this holding. And the Joint Petition does not question such finding. *See infra,* note 17.

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[15] In *Capital Cities,* this Court explicitly declined to consider the claim that the FCC's signal-carriage rules violate the First Amendment rights of cable operators (104 S.Ct. at 2701, n. 6). Similarly, the Court in *Southwestern* noted the absence of a constitutional claim (392 U.S. at 181).

3. The Agency That Promulgated The Must-Carry Rules Has Declined To Seek Review Of The Decision Of The Court Below

Neither of the respondents below, the FCC or the United States, is seeking relief here. In accepting the decision of the court below, the FCC, by a majority of its commissioners, formally stated:

> The *Quincy* decision focused very directly on the First Amendment issues involved. Because the constitutional analysis as to cable represents a positive step toward recognizing full First Amendment protection for all forms of electronic media, we will not challenge it.[16]

Thus, the FCC, which vigorously defended its rules below, now fully acquiesces in the constitutional analysis and findings of the court below. Indeed, the FCC has decided not even to attempt on its own "to recraft the rules in a manner more sensitive to the First Amendment concerns," despite the court's explicit invitation to the agency to do so (Slip Op., A., 60a). In response to such invitation, the FCC stated, "we believe that the better course is to seek an equitable realigning of free marketplace forces rather than another false equilibrium of intrusions on the rights of cable operators, broadcasters, and copyright holders" (A., 142a).[17]

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[16] "Commission Will Not Appeal Quincy Cable TV v. FCC," FCC Public Notice, August 2, 1985 (A., 138a). Thereafter, the FCC announced on September 10, 1985 that the must-carry rules were "vacated" (A., 142a).

[17] The FCC is, however, currently in the process of accepting petitions for rulemaking proposing adoption of new must-carry rules. Indeed, eight of the joint petitioners here *subsequently* filed

By its inaction and proclaimed rationale, the FCC, once the proponent of and strong advocate for the must-carry rules, acknowledges that such rules were overbroad, economically unjustified[18] and, in their present form, violative of the First Amendment freedoms of cable operators, television viewers and other programming sources seeking cable access for distribution of their product. That commercial broadcasters, the economic beneficiaries of these regulatory excesses, want the FCC to reestablish those protectionist rules is not surprising, since "[t]heir very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing the goal is to create an overwhelming competitive advantage over cable programmers" (Slip Op., A., 36a). Loss of a mere "competitive advantage" does not warrant grant of the requested Writ.

Joint petitioners here, mere intervenors in the court below in support of the FCC's position, are in the

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with the FCC on October 4, 1985 their "joint petition for rulemaking" urging, *inter alia*, that the FCC undertake rulemaking "contemplating adoption of new, tailored rules to replace its recently vacated 'must carry' rules." Joint petitioner here, Association of Independent Television Stations, Inc., filed independently with the FCC on October 4, 1985 its "petition for rulemaking" seeking "regulation of cable television carriage of television broadcast signals after the court's action in *Quincy Cable TV, Inc.* v. *FCC*, . . .". We urge that any redress to which petitioners may be entitled from the effects of the decision below is now more appropriately addressed in the context of agency rulemaking—a concept in which petitioners seemingly now concur.

[18] *See* Slip Op., A., 16a-18a ("Commission found that its general economic analysis had failed to substantiate the intuitive fears on which the rules had been premised since the mid-1960's").

peculiar posture of urging the Court to order that the government, not here a party, reissue rules, which rules have been "vacated" (*supra,* note 15) by uncontested agency action with the explicit acknowledgment that they were unconstitutional. As former third-party beneficiaries of the now-vacated rules, joint petitioners have no power *independent of appropriate FCC action* to effect or urge reinstatement of the rules in question. If joint petitioners have any remedy at all, their forum lies more appropriately in the now on-going agency rulemaking (*see supra,* note 17).

The quarrel of joint petitioners is not with the judgment of the court below but rather with the FCC which, without objection from any quarter, acquiesced in the court's mandate by rescinding the rules in question. Without a rule, without any rationale for entitlement to must-carry benefits independent of the former rule, and without any right to speak here for the FCC or to maintain or rely upon a regulation which the agency has formally vacated, joint petitioners have no case. The fact is that the primary parties below (both petitioners and both respondents) now concur in the judgment below.

CONCLUSION

The Joint Petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 21 1985
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No. 85-502

In the Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, ET AL., PETITIONERS

v.

QUINCY CABLE TV, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

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47 C.F.R. :

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Section 76.59 1

Section 76.61 1

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MEMORANDUM FOR THE FEDERAL RESPONDENTS

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1. In this case, the court of appeals held unconstitutional the Federal Communications Commission's current "must-carry" rules, which in general terms require a cable television system to retransmit the broadcast signals of all television stations that serve the area served by the cable system.[1]

a. In 1980, respondent Turner Broadcasting System, Inc., a company that, among other things, provides program services to cable system operators (Pet. App. 7a n.3), filed a petition with the FCC requesting the initiation of a rulemaking proceeding to repeal the must-carry rules. Turner Broadcasting argued that the rules were not

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[1]Pet. App. 11a-13a & n.12. These rules are codified at 47 C.F.R. 76.57, 76.59, 76.61.

necessary to guarantee cable subscribers access to broadcast signals, asserted that the rules violated the First Amendment by requiring cable system operators to carry particular programming, and claimed that the rules subjected providers of non-broadcast program services to a competitive disadvantage. *Id.* at 23a-24a, 69a.

The Commission denied the petition (Pet. App. 69a-73a). It first stated that the must-carry rules did not violate the First Amendment (*id.* at 70a). It found that "[f]rom a policy perspective" there were "countervailing arguments both for keeping and for dispensing with the[] rules" (*ibid.*). The Commission stated that the rules "were adopted because the Commission believed they were necessary to maintain the availability of local broadcast service to both those who were cable subscribers and those who were not" (*id.* at 71a). It noted that the Copyright Act of 1976 established a compulsory licensing scheme enabling cable systems to retransmit broadcast signals without the permission of the copyright owner. It also stated that a substitute for the must-carry rules might not satisfactorily "protect[] [the] access of off-air stations to cable subscribers and thus their viability and accessability to nonsubscribers" (*ibid.*).

The Commission also found several factors weighing in favor of administrative review of the rules. It noted that the must-carry rules favored broadcasters over other suppliers of programming to cable systems and deprived cable subscribers of the ability to select program material (Pet. App. 72a). The Commission concluded that "a more complete factual base is needed before a proceeding of the type requested is commenced" (*id.* at 73a (footnote omitted)).

b. Respondent Quincy Cable TV, Inc., the operator of a cable system in Quincy, Washington, petitioned the FCC for a waiver of the must-carry rules so that it could delete three broadcast signals from its cable service. It argued that

the signals could be received over the air without cable and that the cable channels were needed to carry alternative programming. Pet. App. 26a-27a, 88a-89a. The petition was denied by the chief of the Commission's Cable Television Bureau and the chief's decision was affirmed by the Commission. *Id.* at 88a-104a; see also *id.* at 105a-123a (denying requests for reconsideration). The Commission rejected Quincy's arguments that the must-carry rules violated Quincy's First Amendment rights.

2. The court of appeals consolidated the petitions for review filed by Turner Broadcasting and Quincy Cable and held the Commission's current must-carry rules invalid under the First Amendment (Pet. App. 2a-60a). The court first concluded that First Amendment principles relating to government regulation of the broadcast media do not govern the constitutionality of regulations applicable to cable systems (*id.* at 29a-34a). Applying the standard for measuring the constitutionality of "incidental" burdens on speech established by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968), the court of appeals held that "the must-carry regulations, as written, are clearly impermissible" (Pet. App. 41a). It found that "in the particular circumstances of this constitutional challenge the Commission has failed adequately to demonstrate that an unregulated cable industry poses a serious threat to local broadcasting and, more particularly, that the must-carry rules in fact serve to alleviate that threat" (*id.* at 51a). The court also found the rules unconstitutional "as currently drafted" because they are a " 'fatally overbroad response' to the perceived fear that cable will displace free, local television" (*id.* at 53a (citation omitted)).

The court emphasized that it was "hold[ing] only that in their current form [the must-carry rules] can no longer stand" (Pet. App. 60a). It stated that "[s]hould

the Commission wish to recraft the rules in a manner more sensitive to the First Amendment concerns we outline today, it is, of course, free to do so. We would consider the constitutionality of the product of that effort at the appropriate time" (*ibid.*).

3. Review of the decision below is not warranted because the Commission no longer wishes to maintain the must-carry rules invalidated by the court of appeals. Since the court of appeals expressly limited its holding to the present rules, and the Commission currently is considering various regulatory alternatives, this Court need not address the constitutional questions raised by petitioners at this time. If the Commission promulgates new regulations, and the court of appeals holds those regulations unconstitutional, this Court will have the opportunity to consider the relevant issues in that context.

The court of appeals repeatedly emphasized that its holding applied only to the current must-carry rules, invited the Commission to "recraft the rules," and stated that it "would consider the constitutionality of the product of that effort at the appropriate time" (Pet. App. 60a). After the court of appeals rendered its opinion, a majority of the Commission stated that the rules invalidated by the court of appeals were inappropriate "in the mass media marketplace of today" (*id.* at 138a).

Several parties, including a number of the petitioners before this Court, have filed rulemaking petitions requesting that the Commission issue a notice of proposed rulemaking to adopt new rules in place of the must-carry rules invalidated by the court of appeals. The Commission recently issued a "Notice of Inquiry and Notice of Proposed Rule Making" soliciting public comments regarding the

issues raised in the rulemaking petitions. See *In the Matter of Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems,* MM Docket No. 85-349 (Nov. 14, 1985).[2] The chairman of the FCC has indicated that rulemaking petitions relating to this issue will be "carefully consider[ed]." App., *infra,* 2a.[3]

In view of these developments, it is both unnecessary and inappropriate for this Court to review the decision of the court of appeals in this case. If the Commission issues new must-carry rules, the constitutionality of those rules will be addressed by the court of appeals in the first instance. This Court then would have an opportunity to consider the issues raised by petitioners in the context of rules that the FCC considers necessary to further the public interest. There is no warrant for this Court to address sensitive constitutional issues when the Commission has disclaimed

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[2]We have lodged with the Clerk of this Court copies of the Notice of Inquiry and Notice of Proposed Rule Making and copies of the rulemaking petitions.

[3]At the time the Commission majority issued its statement regarding the current must-carry rules, it indicated that it could not "conceive of a new set of rules which would accomplish the Commission's policy goals and would meet the constitutional test outlined in the *Quincy* decision" (Pet. App. 138a). The chairman subsequently explained that this statement was not intended "to preclude any party from coming forward with a proposal which would include a set of carefully crafted mandatory carriage rules, and a clear justification of the policy aims and constitutionality of such rules" (App., *infra,* 2a). Thus, the Commission intends to give full and appropriate consideration to the proposals advanced in the petitions for rulemaking.

any interest in maintaining the rules invalidated by the court of appeals.[4]

Respectfully submitted.

CHARLES FRIED
Solicitor General

JACK D. SMITH
General Counsel
Federal Communications Commission

NOVEMBER 1985

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[4]There is accordingly no reason for the Court to hold this case pending its disposition of *Los Angeles* v. *Preferred Communications, Inc.*, cert. granted, No. 85-390 (Nov. 12, 1985). The issue in *Preferred Communications*—whether the First Amendment requires a municipality to permit the use of its facilities by all persons interested in providing cable television service—differs substantially from the question presented here. To the extent this Court's decision in *Preferred Communications* sets forth general principles relating to the application of the First Amendment to regulations governing cable system programming, the Commission will, of course, fully take account of those principles in considering the pending rulemaking petitions.

DOJ-1985-11

APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Sept. 24, 1985

Senator Barry Goldwater
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your September 13, 1985 letter concerning must carry. I appreciate your support for the Court's decision in *Quincy* and our decision not to appeal that case. You are right that we are faced with a continuing deluge of questions on this matter, particularly from new independent stations now in the process of starting operations.

As Commissioners Dawson, Patrick, and I stated at the time we released the public notice of our decision to not appeal the *Quincy* case, the *Quincy* decision's constitutional analysis as to cable represents a positive step toward recognizing First Amendment protection for all forms of electronic media. We applauded that. However, we felt that the Court, by removing the cable must carry obligation without changing the special treatment cable receives under the copyright law, had created an unbalanced situation which deserved a solution. We suggested that a true mass media marketplace would not be achieved until cable's copyright immunity was replaced with a scheme of full copyright liability, allowing unimpeded negotiations between the parties.

After carefully considering the possibility of resurrecting the must carry rules, we noted that we could not conceive of a new set of rules which would accomplish the Commission's policy goals and would meet the constitutional test

outlined in Quincy. We felt the better course was an equitable realigning of free marketplace forces (through changes in the copyright immunity afforded cable) rather than another false equilibrium balancing the present copyright immunity with new carriage rules which would displace cable consumer choices and interfere with the marketplace.

Nonetheless, we never intended our statement to preclude any party from coming forward with a proposal which would include a set of carefully crafted mandatory carriage rules, and a clear justification of the policy aims and constitutionality of such rules. So far, no one has come forward.

I assure you that we will carefully consider any such petition we may receive. My sense is that such a petition would benefit from public comment, and the Commission would seek such comment with a combined Notice of Inquiry/Notice of Proposed Rule Making. Any inquiry would include an examination of the communications policy implications of cable's compulsory license in light of the *Quincy* case.

Again, thank you for your concern about this issue.

Sincerely,

Mark S. Fowler
Chairman

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Supreme Court, U.S.
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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-502

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

QUINCY CABLE TV INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

The briefs of Quincy Cable, NCTA and TBS in opposition to the petition are largely devoted to claims that the result reached below, "while indisputably important," is the correct result, in no small measure because that decision is said to be "one of a number of recent [lower court] decisions" invalidating long-standing cable television regulatory measures on First Amendment grounds. TBS Brief, p. 22. To support

such claims they rely, like the decision below, on a Ninth Circuit decision in which this Court quite recently granted certiorari. *Preferred Communications, Inc.* v. *City of Los Angeles*, 754 F.2d 1396 (9th Cir.), cert. granted, No. 85-390, ___U.S. ___(November 12, 1985).[1]

In the broadest sense *Preferred* and this case present the same ultimate issue: The extent to which, if at all, cable television, a *de facto* monopoly upon which some 43 percent of the American population depends for its television reception, is immune under the First Amendment from regulation aimed at insuring that cable systems provide certain services, or at least do not block or impede the public's reception of certain television services. But the narrow issues in *Preferred* and the instant case are not identical. Although both lower court opinions consider the issue in terms of an incidental burden on speech, the Ninth Circuit panel relied heavily on the public forum doctrine while in this case the D.C. Circuit panel extended the concept of "coerced speech" to cable systems. *Preferred* involves governmental authority to control use of public rights of way, authority that is typically exercised in this context by the mechanism of state or local government franchising. The instant case involves the FCC's jurisdiction, confirmed by this Court in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), to regulate the retransmission of television broadcast signals by cable systems. In the former situation the governmental entity typically seeks commitments that applicants will provide the "best" cable

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[1]See Quincy brief, pp. 10, 11; NCTA brief, pp. 16, 17; TBS brief, pp. 13, 22; Pet. App. pp. 20a, 30a, 32a.

service (in terms of the number and diversity of services relative to the prices charged), and offers as a *quid pro quo* a franchise to operate what almost invariably turns out to be a *de facto* if not a *de jure* monopoly. In the latter, the purpose is more narrow: to insure that cable systems, which historically have enjoyed (and continue to enjoy) a unique privilege to exploit broadcast signals, do not do so in ways which are disruptive or injurious to the overall purposes of the Communications Act of 1934, as amended. 47 U.S.C. §§ 151 *et seq.* (1982).

The federal regulations held unconstitutional by the court below have heretofore been held by this Court to preempt inconsistent state or local measures,[2] including, presumably, any inconsistent state or local franchise provisions. Moreover, unlike the governmental action at issue in *Preferred*, the must carry rules do not preclude anyone from operating a cable system or any cable operator from distributing any sort of programming (so long as the cable operator installs enough channel capacity to retransmit must carry broadcast signals and whatever else the operator wishes to distribute). Thus, the franchise regulation in *Preferred* might be viewed as creating an absolute barrier to entry that warrants somewhat different treatment.

Because of these and other differences, the Court's decision in *Preferred* will not necessarily be determinative in this case. Thus, deferring consideration of the petition in this case until *Preferred* is decided could leave the lower courts and the agency without appropriate guidance as to the federal element of the

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[2]Capital Cities Cable, Inc. v. Crisp, ___U.S. ___, 104 S. Ct. 2694 (1984).

cable regulatory-First Amendment equation. This case accordingly ought to be heard in tandem with *Preferred* so that the Court will have the benefit of a full development of the considerations bearing on the broad constitutional issue.[3]

Although it too urges denial of certiorari, the Memorandum of the Federal Respondents ignores the merits completely. This is perhaps understandable in view of the FCC's persistent but unsuccessful defense of the must carry rules prior to the decision below.[4] Instead, the Federal Respondents (p. 4) assert that

> "Review of the decision below is not warranted because the Commission no longer wishes to maintain the must-carry rules invalidated by the court of appeals."

The FCC's current "wishes" stand in rather sharp contrast to the agency's unwavering commitment to must carry rules over a period of some 20 years prior to the lower court decision.[5] In any event, agency

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[3]It ought to be feasible to brief and argue *Preferred* and the instant case in tandem during the current Term, and in any event, petitioners are amenable to any reasonable scheduling adjustments that the Court may regard as necessary to accomplish that objective.

[4]Only sixteen months ago, the FCC told the Court of Appeals that:

> "The must carry rule is . . . fully constitutional under established standards: the rule serves an important federal interest and it goes no further than it needs to in order to achieve the federal goal."

Brief of Respondent FCC, p. 16, July 25, 1984, in Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985) (No. 83-2050).

[5]As late as the oral argument before the court of appeals on

"wishes" are not a valid reason for denying certiorari in this or in any other case in which those "wishes" are not supported by a reasoned analysis of the per-

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April 16, 1985, the FCC continued its persistent defense of the must carry rules. On August 2, 1985, a three-member majority of the FCC announced that the agency would not "appeal the [lower] Court's ruling" even though that ruling "unbalanced" the marketplace relationship of cable and broadcasting and made necessary a new Copyright Act that would create "an equitable realigning of free marketplace forces . . .;" the FCC majority also observed that

> "we cannot conceive of a new set of rules which would accomplish the Commission's policy goals and would meet the constitutional test outlined in the [lower court's] *Quincy* decision."

Pet. App. p. 138a.

On August 23, 1985, the FCC advised the lower court that the agency supported a stay of mandate pending disposition of a petition for certiorari, noting that

"the panel's opinion raises important and difficult issues . . .."

Comments of FCC in Support of Motion for Stay of Mandate Pending Petition for Writ of Certiorari, p. 2.

On September 24, 1985 (the day after the petition for certiorari in this case was filed), FCC Chairman Fowler, writing as one member of the agency, assured a member of the Senate that, despite the FCC majority's August 2 statement that it could not conceive of a new set of rules which would satisfy the court of appeals and meet the agency's policy objectives, the FCC if formally asked to do so would consider proposals for new rules in the context of a new rulemaking proceeding. Mem. of Fed. Resp., App. pp. 1a-2a.

On November 18, 1985, the FCC formally announced the start of such a rulemaking proceeding, *Notice of Inquiry and Notice of Proposed Rule Making*, MM Docket No. 85-349, FCC 85-607 (copies lodged with the Clerk of this Court by the Federal Respondents). This *Notice* gives no clue as to what sort of rules, if any, the agency now regards as conceivably permissible and

tinent policy considerations or when they stem from an erroneous view of substantive law. Repeal of agency regulations, particularly in the case of long-standing regulations, requires a notice-and-comment rulemaking proceeding pursuant to the Administrative Procedure Act, 5 U.S.C. § 553 (1982), followed by a "reasoned analysis" by the agency justifying its changed course of action, an analysis that goes well beyond what is required when the agency simply is declining to act in the first instance. *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983).

Here the FCC has not conducted a rulemaking proceeding looking toward repeal of the long-standing must carry rules. Rather, it has only just begun a quite different rulemaking proceeding which treats rescission of the long-standing rules as a *fait accompli* and which, on the basis of the decision below, adopts a presumption ("heavy burden of justification") against any new or substitute rules. Moreover, instead of a reasoned analysis justifying rescission on policy grounds, the FCC has simply announced, *sua sponte*, that it is enamored of the lower court's First Amendment analysis. But the lower court's analysis of the substantive constitutional issues cannot be presumed to be correct, for that is the very issue posed by the petition. Thus, the "wishes" of the FCC are irrelevant.[6]

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desirable. Rather the *Notice* calls upon proponents of new must carry rules to demonstrate both that such rules would serve the public interest and would satisfy the "heavy burden of justification on the Commission" which the lower court indicated would be necessary, at a minimum, to support the constitutionality of new rules. *Notice*, para. 8.

[6]The suggestion that the instant petition should not even be

The Federal Respondents (pp. 4-6) also assert that the FCC's November 18 action beginning a new rulemaking proceeding counsels in favor of denying certiorari.[7] However, the pendency of the agency's new proceeding is a rather dramatic demonstration that the "indisputably important" issues addressed by the lower court are not simply going to fade away. To the contrary, those issues have continuing significance to the lower courts, the administrative agency, and the public at large, and thus are precisely the sort of issues that ought to be resolved by this Court. Put another way, the agency *Notice* signals a wholly new proceeding made necessary by the court of

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deferred pending the outcome in *Preferred*, because the Federal Respondents have no "interest" in maintaining the long-standing rules (p. 6 & n. 4) is unsound for the same reasons. The agency's "interest," or lack thereof, is not the reasoned analysis that is required to justify repeal.

[7]While never made explicit, the Federal Respondents seem to be suggesting that the FCC might adopt new rules that might be similar to the old rules and that those new rules might be upheld as constitutional (perhaps even by the panel that rendered the decision below in this case), thereby obviating the need for this Court to resolve the constitutional issues.

If that is indeed their position, it is one that is unsound as well as implausible. For one thing, although the lower court paid some deference to the Article III truism that it was only deciding the case before it, when it observed that the FCC was free "to recraft the rules in a manner more sensitive to the [panel's perception as to the reach of the] First Amendment" (Pet. App. p. 60a), the opinion also warned the agency that the panel was not merely " 'quibbling over fine-tuning . . .." ' Pet. App. p. 53a. For another, even if all these events occurred, the parties who are unhappy with must carry rules would no doubt be knocking on the Court's door with their own petition for certiorari.

appeals, not just further proceedings after an interlocutory appellate decision. In the new proceeding the FCC will only adopt new rules if it concludes that those new rules can both (1) pass legal muster under the lower court's standards and (2) meet the agency's perception of what is appropriate as a matter of public policy. *See* Note 5 *supra*. The first of these twin inquiries involves essentially a legal issue, and it will be a misguided, if not pointless inquiry if, as we contend, the lower court's decision is unsound.

* * *

Judge Wright's opinion for the court below contains an elaborate development of a constitutional theory with significant implications for cable regulation generally. The case is ripe for immediate review by this Court. The Court has already (and quite recently) committed to review related constitutional issues in *Preferred*. Far from constituting a reason for denying certiorari, the FCC's recent decision to initiate a rulemaking proceeding simply underscores the fact that the issues addressed by the lower court are very much alive in the sense that they are likely to recur in that or other lower courts. Clarification of those issues by this Court now is therefore appropriate so that the FCC and lower courts will have the benefit in future proceedings of a definitive ruling.

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Supreme Court, U.S.
FILED
JUN 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-502

IN THE

Supreme Court of the United States

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Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the District of Columbia Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner National Association of Broadcasters ("NAB") submits this Supplemental Brief in support of the petition jointly filed by NAB and others[1] on September 23, 1985. That the petition is still pending eight months after being filed is presumably explained by a decision to defer action on the petition pending the Court's decision on the merits in another case in which governmental regulation of cable

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[1] In order to avoid any delay in the filing of this Supplemental Brief, NAB has not asked the other parties joining in the petition if they wished to join in this Supplemental Brief.

television has been challenged under the First Amendment. *City of Los Angeles* v. *Preferred Communications, Inc.*, No. 85-390, decided June 2, 1986. When action on a petition is deferred pending a decision on the merits in a case presenting similar issues, the latter decision usually results either in a denial of the deferred petition or in a brief order simultaneously granting the petition, vacating the decision below, and remanding the case for further consideration by the lower court in light of this Court's recent decision on the merits of the other case.

In the present instance, however, neither of these "usual" dispositions would be appropriate. This is because the Court's decision in *Preferred Communications* expressly declines to resolve the constitutional issues presented in that case. Instead, the Court simply announced that it was "unwilling to decide the legal questions posed by the parties without a more thoroughly developed record of proceedings in which the parties have an opportunity to prove those disputed factual assertions upon which they rely." Slip Op. p. 5.[2] Because of the unwillingness to reach the constitutional issues, the Court's decision in *Preferred Communications* neither obviates the need for review of the decision below, nor provides any guidance which would assist the lower court in giving further consideration to the issues.

At the same time, the lower courts, the various governmental agencies such as the respondent FCC, the immediately affected industries and the public are in need

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[2] In *Preferred* the conflicting factual assertions had not been addressed below because the district court granted the City's Rule 12(b)(6) motion. In contrast, there is no lack of a factual record in the instant case. The FCC made extensive findings in 1966 and again in 1972 when it first adopted and then modified the rules at issue here, and made still further determinations of fact in the agency orders denying the petition for rulemaking and the ad hoc waiver request that ultimately came before the court of appeals.

of some clear guidance from this Court on the extent of First Amendment limitations on cable television regulation. That need has not abated in any respect in the eight months since the petition in the instant case was filed. If anything, the need for such guidance has grown more acute with the passage of time.

Some six months ago, the FCC counseled against the Court's taking of the present case, pointing out that the agency had at that time just begun a new rulemaking proceeding to consider alternatives to the longstanding FCC rules condemned by the court of appeals and noting that the agency would "fully take account of" such general First Amendment principles relating to cable television as "this Court's decision in *Preferred Communications* sets forth. . . ." Memorandum For Federal Respondents, pp. 4-6 and n. 4.[3] Several months later, in the course of that rulemaking proceeding, major elements of the affected industries developed a jointly sponsored proposal for alternative rules. However, the FCC to date has failed to act on any of the proposals before it. If the FCC inaction stemmed from a hope that this Court would illuminate the constitutional questions with its decision in *Preferred Communications,* the agency must now be sorely disappointed. Not only has the Court decided that those issues should not be addressed on the present record in *Preferred* but a full trial by the district court, preceded by discovery and followed by another round of appellate litigation in the Ninth Circuit, means that a second decision in *Preferred* by this Court is several years away, if indeed the case ever returns to this Court.

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[3] For the reasons set forth in their Reply Brief (see pp. 4-8) Petitioners contend that this argument is specious.

For the reasons set forth above and in the Joint Petition and Reply Brief, petitioner NAB urges the Court to grant the petition forthwith.

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Supreme Court, U.S.
FILED
OCT 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The
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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF PETITION

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BRIEF OF THE STATE OF CONNECTICUT AS AMICUS CURIAE IN SUPPORT OF PETITION

The State of Connecticut, sponsored by the Attorney General of the State of Connecticut, submits this brief in support of the Joint Petition For A Writ of Certiorari filed by the National Association of Broadcasters et al., seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Quincy Cable T.V., Inc. v. Federal Communications Commission,* 768 F.2d 1434, attached as Appendix A to the Petition filed herein. The State of Connecticut files this brief pursuant to Rule 36.4 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE, STATE OF CONNECTICUT

The State of Connecticut grants franchises to cable television systems to provide cable television service in Connecticut. According to statute, Connecticut cable franchises require cable operators to serve the "public interest." 47 U.S.C. 521 (2); § 16-331(a), Connecticut General Statutes. The public interest requires that cable operation protect and promote the free speech rights of the listening and viewing public.

The FCC's "must-carry" regulations were designed to further the First Amendment rights of the public in both broadcast and cable television. The decision of the Court of Appeals for the District of Columbia Circuit which is the subject of this Petition for a Writ of Certiorari adversely affects both the State's ability to require Connecticut cable operators to serve the public interest of Connecticut residents and the First Amendment rights of Connecticut residents. The State of Connecticut, therefore, has a direct and substantial interest in this proceeding.

SUMMARY OF THE ARGUMENT

In exchange for the use of the public streets and ways, cable operators are required to operate in the public interest and to be responsive to the needs of the local communities which they serve. 47 U.S.C. 541(b)(1), 521(2). The Federal Communications Commission "must-carry" rules, requiring cable carriage of all local and "significantly viewed" broadcast stations, opened local broadcasting stations and cable systems to the public as local forums for public expressive activity. The regulations, therefore, furthered the public's First Amendment rights in the electronic media.

Cable operation is subject to the same public interest regulation as the broadcast industry. Both industries appropriate portions of the public domain to the exclusion of the public's exercise of its right to free expression. The free speech rights of cable operators, therefore, are secondary to the First Amendment rights of the public.

The Court of Appeals, however, failed to consider the public interest considerations contained in the must-carry rules and erroneously excluded the constitutional rights of the public from cable operation. The Court's decision enhances the voices of a few select individuals in the electronic media at the expense of the many who do not have the opportunity to engage in electronic speech. The Court's decision, therefore, is contrary to the fundamental principles of the First Amendment.

ARGUMENT

I. The Question Presented Is Substantial And Should Be Decided By This Court

The primary goal of the First Amendment is to provide "the widest possible dissemination of information from diverse and antagonistic sources" (*Associated Press v. United States*, 326 U.S. 1, 20 (1945)) and to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). Cable television is a relatively new, but important, component of the "marketplace of ideas." Cable systems provide local television broadcast signals, television signals from distant cities and "new programming services" including "movies and other programs uninterrupted by commercial advertisements . . . sports, news and specialized programming directed to a number of individual segments of the national audience such as children, minorities and senior citizens." *House Report of the Committee on Energy and Commerce*, No. 98-934, 98 Cong., 2d Session (1984); *Capital Cities Cable, Inc. v. Crisp*, 104 S.Ct. 2694 (1984). With the capability to carry over 100 channels of information into the homes and businesses of subscribers, cable systems are becoming, in a very real sense, the electronic marketplace of ideas.

The First Amendment is directed to the rights of both speakers and listeners. The speakers' right to present and disseminate ideas is correlative to the listeners' right to hear from "diverse and antagonistic sources." *Kovacs v. Cooper*, 336 U.S. 77 (1949); *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945). The relative rights of speakers and listeners is dependent on the medium of expression involved. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975).

This Court has not had the occasion to consider the free speech rights of speakers and listeners in the field of cable television. Substantial First Amendment questions, however, have been raised through the Courts of Appeals and are currently pending in this Court. The instant case presents the question of the accountability of cable operators to the First Amendment rights of the viewing public. *City of Los Angeles, California, and Department of Water and Power v. Preferred Communications, Inc.*, Supreme Court No. 85-390, presents the related issue of a cable operator's First Amendment right to permanently appropriate portions of the public domain for private business and personal expressive purposes. Both *National Association of Broadcasters v. Quincy Cable T.V., Inc.*, Supreme Court No. 85-502, and *City of Los Angeles, California, and Department of Water and Power v. Preferred Communications, Inc.*, Supreme Court No. 85-390, present issues of substantial public importance. The resolution of those issues will have a profound effect on the public's future ability to exercise its free speech rights in cable communications.

II. The Must-Carry Rules Promote The Free Speech Rights Of The Public In Cable Television

Free speech in terms of the mass media presents special considerations: "differences in the characteristics of the news media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969). A particular medium of expression is either more or less restricted depending upon the ability of all members of the public to employ that medium. *Community Communications v. City of Boulder*, 660 F.2d. 1370, 1378 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982). "There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." *Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S. at 392.

The ability to publish a newspaper or pamphlet is available to everyone. The print media, therefore, enjoys the greatest freedom of expression. A newspaper's editorial control over the presentation of its views is not subject to limitation:

> The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment.

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

Although the general public has an open opportunity to present its ideas through the print media, the use of radio or television as a medium of expression is not available to everyone. The broadcast frequency is part of the public domain and each individual has an equal right to use that public property for expressive purposes. The broadcast frequency spectrum, however, has a limited physical ability in the number of speakers which it may accommodate. Everyone, therefore, may not broadcast. *FCC v. Pottsville Broadcasting Co.,* 309 U.S. 134 (1940). As everyone may not use the public domain for expressive purposes, the free speech rights of those that do are secondary to the First Amendment rights of those that cannot — the listening and viewing public. For this reason, the First Amendment rights of the "viewers and listeners, not . . . the broadcasters, . . . is paramount. It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here." *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at 390.

The Federal Communications Commission was given the power to regulate broadcasting in the "public

interest." 47 U.S.C. 303. The Commission's regulation under the public interest standard "necessarily invites reference to First Amendment principles." *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94, 122 (1973). Under the Communications Act of 1934, therefore, the FCC was given not only the power of "policing the wavelengths to prevent stations from interfering with each other" by "supervising the traffic," but was given the duty "of determining the composition of the traffic." *National Broadcasting Co. v. United States,* 319 U.S. 190, 215-216 (1943).

Congress and the FCC have actively promoted the free speech rights of the public in broadcast television programming. The "fairness doctrine" requires fair coverage of controversial issues, provides editorial reply time to those with opposing views and confers on individuals the right to respond to "personal attacks," *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969). Under the "equal time" provisions of the Communications Act (47 U.S.C. 315), all candidates for public office have an equal opportunity to use broadcast stations. 47 U.S.C. 312 (a)(7) provides candidates for federal public office with the right of reasonable access to broadcast facilities to present their candidacies. *CBS, Inc. v. Federal Communications Commission,* 453 U.S. 367 (1981).

In accord with its responsibility to promote the public interest, the FCC issued its "must-carry rules," requiring cable operators to transmit the signals of all local or "significantly viewed" broadcast stations in their cable franchise area. 47 C.F.R. §§ 76.57-76.61 (1984). The public interest goals contained in the regulations were two-fold: 1) to limit the competitive risk which cable posed to the public's receipt of "free" conventional broadcasting, and 2) to encourage the growth and development of local broadcasters as "outlets for local expression." *First Report and Order,* 30 FCC 683 (1965); *Second Report and Order,* 2 FCC2d 725 (1966); *United States v. Southwestern Cable*

Co., 392 U.S. 157 (1968). The FCC's second goal, coupled with the operation of broadcasting policies such as the "fairness doctrine," opened more local broadcasting stations and cable systems to the public as local forums for public expressive activity.[1] The FCC's must-carry rules, "encouraged diversified programming suitable to the communities needs," (*United States v. Midwest Video Corp.*, 406 U.S. 649, 666-669 (1972)) and helped to make cable systems "responsive to the needs and interests of the local community." 47 U.S.C. 521(2). By increasing "diversity" and the responsiveness of cable systems to local communications needs, the FCC regulations directly furthered the public's right "to have the medium function consistently with the ends and purposes of the First Amendment." *Federal Communications Commission v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 798-802 (1978), *Red Lion Broadcasting Co. v. F.C.C.*, *supra*, 395 U.S. at 390.[2]

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[1] Where the FCC formerly had jurisdictional authority over cable "ancillary" to its power to regulate broadcasting (*United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968)), the FCC now has direct authority to regulate cable operation "to assure that cable communications provide . . . the widest possible diversity of information sources and services to the public." 47 U.S.C. 521(4).

[2] The FCC must-carry rules are content neutral. The cable companies' signal carriage requirement is not based upon the "content" of the programming carried by broadcast stations. Their "purpose and effect is to promote free speech, not to restrict it." *F.C.C. v. National Citizens Committee for Broadcasting, supra*, 436 U.S. at 800-801. While it has been argued that the must-carry rules no longer further the public interest under the current state of cable development, that is a matter of judgment and presents an issue wholly different from the constitutional rulings made by the Court of Appeals. *Federal Communications Commission v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *CBS, Inc. v. FCC, supra*, 453 U.S. at 390. If the "public interest" requires a change in the must-carry regulations, then a regulation adoption process before the FCC, where the free speech rights of the public are considered, would be appropriate. The Court's "constitutional findings," however, now preclude any proper administrative analysis of the must-carry rules.

The Court of Appeals, however, has concluded that the "must-carry rules" violate cable operators' First Amendment right to carry whatever programming they choose. Additionally, the Court found that the rules violate the First Amendment rights of cable programmers because the regulations purportedly give preferential access to the cable medium to broadcast stations. The Court's interpretation of the First Amendment in relation to cable programming is erroneous. The Court's conclusions are the result of a misreading of this Court's decisions and a misunderstanding of fundamental First Amendment principles.

III. The Court Of Appeals' First Amendment Analysis Ignores The Free Speech Rights Of The Public

Public interest regulation of the broadcast industry has been repeatedly sustained by this Court because the "limited facilities" of broadcasting are "not available to all." *National Broadcasting Co. v. United States, supra,* 319 U.S. at 226. The Court of Appeals, however, ruled that the First Amendment principles applicable to broadcasting cannot be transferred to cable because of a cable system's capacity to "simultaneously" carry many more signals than broadcasters. Cable operators, therefore, are not "privileged occupants of a physically scarce resource" and have no status "as fiduciaries of the public's interest." Appendix A, p. 31a. The Court's reasoning is plainly wrong.

Contrary to the finding of the Court of Appeals, the "scarcity rationale" is not dependent on the number of signals that an electronic speaker may employ. Instead, "scarcity" is based upon the *number of speakers* that may occupy a particular electronic forum. "Scarcity" simply means that if *everyone* cannot use the public domain for expressive purposes, then the free speech rights of those that do are secondary to the First Amendment rights of those that cannot. *National Broadcasting Co. v. United*

States, supra, 319 U.S. at 226-27. This principle is applicable to broadcasting because a broadcaster's use of a portion of the public domain—the particular bandwidth of the broadcast frequency spectrum—excludes use of that portion of the frequency spectrum by others with equal First Amendment rights. The fact that the full range of the frequency spectrum may accommodate its use by others does not relieve individual broadcasters from public interest regulation. *Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S. at 399.

Like broadcasting, and unlike newspapers, cable must employ the public domain—the public streets and ways—to exist. A cable operator's use of that public domain constitutes a "permanent physical occupation" of that property (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)) and excludes expressive use of such property by other members of the public with an equal First Amendment right of access. "The use which the [company] makes of the streets is an exclusive and permanent one . . . It as effectively and permanently dispossesses the general public as if it had destroyed that amount of ground." *St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 98-99, (1893), quoted in *Loretto v. Teleprompter Manhattan Cable, supra*, 458 U.S. at 428-429. *Disruption* of the public streets and ways allows for government regulation of cable to promote public safety and limit public inconvenience. *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982). A cable system's *appropriation* of the public domain allows for government regulation to further the First Amendment rights of the public.

The Court's finding that a cable operator may carry 100 programs "simultaneously" while a broadcaster may only carry one is a distinction without a difference in terms of the First Amendment. While there may or may not be "scarcity" *within* the cable wire, there is a practical physical limit on the number of cable wires that may

traverse the public domain.[3] The First Amendment common denominator between broadcasting and cable operation is not the number of signals that each medium may transmit, but, instead, is the number of speakers that may "sit astride" the channels of communication. In both broadcasting and cable only one or a few speakers may occupy the public domain. Their appropriation of the public domain excludes the expressive activity of the general public.[4] Like broadcasters, therefore, cable operators' programming is subject to regulation in the public interest. Under the Communications Act, that regulation demands that the public's First Amendment rights be "paramount." *Red Lion Broadcasting Co. v. F.C.C., supra,* 395 U.S. at 390.[5]

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[3] If each member of the public chose to exercise the right to operate a cable system, a wall of wires would extend down every street. The result of the public's exercise of its right to speak over cable would, therefore, create a situation as chaotic as occurred in the early days of broadcasting. *Community Communications Co. v. City of Boulder,* 660 F.2d 1370 (10th Cir. 1981); *Berkshire Cablevision of Rhode Island, Inc. v. Burke,* 571 F.Supp. 976 (D.R.I. 1983).

[4] First Amendment principles are blind to economic forces. Although "economic scarcity"—the inability of everyone to afford to operate an element of the mass media—cannot limit a speaker's First Amendment rights (*Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241), the converse is also true. The inability of everyone to afford to use the public domain for expressive purposes does not confer exclusive free speech rights on those that can afford to speak. *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at 399. *Columbia Broadcasting System v. Democratic National Comm.,* 412 U.S. at 123.

[5] Both this Court and Congress have specifically provided for cable programming requirements to further the public's First Amendment right to diversity. *United States v. Midwest Video Corp.,* 406 U.S. 649, 668-669—local origination requirement ensures "suitably diversified programming" and provides for "[l]ocal program service," a "vital part of community life."

(continued)

The Court of Appeals' additional conclusion that neither "natural" nor "economic monopoly" theories support government regulation of cable programming is beside the point. Contrary to the Court of Appeals' reasoning, monopoly status is not the touchstone for public interest regulation. The fact that more than one broadcast station is capable of serving the same area does not diminish the public's free speech rights in that medium. The fact that the broadcast frequency spectrum may accommodate use by others does not give each broadcaster a First Amendment right to a license. *Red Lion Broadcasting Co. v. F.C.C., supra*, 395 at 399-401. Like broadcasters, cable operators occupy a "preferred position" for expressive activity in the public domain. As in broadcasting, the fact that the public domain may support one or more cable operators does not give any operator a First Amendment right to appropriate that portion of the public domain which his or her wires must necessarily occupy. Just as the right to speak in public parks and meeting places cannot be selectively conferred on certain individuals (*Hague v. Committee for Industrial Organization*, 307 U.S. 496, 515-516 (1939)), selected individuals have no constitutional right to permanently occupy the new electronic parks and public meeting places of this country to the exclusion of the expressive rights of others. "Some present possibility for new entry by competing stations is not enough . . . to render unconstitutional the Government's effort to assure that" cable operators "serve the public interest." *Red Lion Broadcasting Co. v. F.C.C., supra*, 395 U.S. at 400. The physical ability of utility poles to support more than one cable wire, therefore, does not excuse the few who "sit astride" the channels of communication from regulation in the public interest.

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5 continued

Leased access and public access channel requirements (47 U.S.C. §§ 531, 532) will provide "a wide diversity of information sources to the public—the fundamental goal of the First Amendment." *House Report, supra*, page 30; 1984 U.S. Cong. and Ad. News 4667.

The Court of Appeals was faced with the competing First Amendment rights of three groups—cable programmers (Turner Broadcasting network), cable operators (Quincy Cable Television, Inc.), and the public. The Court of Appeals failed to realize that the rights of broadcasters were not in issue—the "must-carry" rules made broadcast signals a proxy for the free speech rights of the public. The Court's analysis erroneously ignored the public's First Amendment interests and concluded that the must-carry rules favored "one group of speakers" (broadcasters) "over another" (cable operators and programmers). By failing to consider the public's free speech rights in broadcasting and cable, the Court's decision does exactly what it intended to avoid. Private cable operators' and cable programmers' free speech rights are enhanced at the expense of the free speech rights of the public—a concept "wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

The relevant and ultimate question which must be resolved is whether the regulations continue to serve the "interest of the public"—not whether they serve the interests of either broadcasters, cable operators or cable programmers. *Columbia Broadcasting System v. Democratic National Committee, supra*, 412 U.S. at 122. This question must be decided in an administrative proceeding where the primary consideration is the establishment of rules designed to enhance the public's free speech rights in the electronic media. The Court ignored this basic principle and skewed any possible future administrative action by positing a constitutional test which requires the public interest to prove itself against claimed First Amendment rights of select individuals. Ironically, and unfortunately, the Court of Appeals has placed the burden of proving the constitutional validity of regulations designed to further the First Amendment on those that the First Amendment was designed to protect—the listening and viewing public. Having been excluded from the use of the broadcast and cable mediums, the public must now either demonstrate

why its interests do not infringe on the "rights" of those who have appropriated the public domain or idly watch as the First Amendment right to speak is divided among those who have achieved preferred positions for expression at the public's expense. Irrespective of the Court of Appeals' conclusions, the constitution does not sanction the disenfranchisement of the public from the electronic media: "Freedom to publish means freedom for all and not for some." *Associated Press v. United States, supra,* 326 U.S. at 20.

Cable television is rapidly becoming the "market place" for electronic speech. According to the Court of Appeals, participation in that marketplace—and the consequent information sources which will be available to the listening and viewing public—depends solely upon the "editorial discretion" of cable operators. The First Amendment, however, does not "countenance monopolization of that market by the Government itself or a private licensee." *Red Lion Broadcasting Co. v. F.C.C., supra,* 395 U.S. at 390. Cable programming regulations which are designed to increase diversity and to expand the number of local outlets for public expression do not offend the First Amendment. Instead, such regulations protect against "unlimited private censorship . . . in a medium not open to all." *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at 392. It is those that aspire to be private censors and not the public who should be required to demonstrate that their activities in the electronic marketplace serve the First Amendment.

CONCLUSION

For the above-stated reasons, a writ of certiorari should be issued to the United States Court of Appeals for the District of Columbia Circuit.

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Supreme Court, U.S.
FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-502

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,

v.

QUINCY CABLE TV, INC., *et al.*,
Respondents.

On Joint Petition for Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

BRIEF OF HOWARD UNIVERSITY AS AMICUS CURIAE IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI

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BRIEF OF HOWARD UNIVERSITY AS AMICUS CURIAE IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI

Howard University submits this brief, as amicus curiae, in support of the petitioners' request that a writ of certiorari issue to review the judgment

of the United States Court of Appeals for the District of Columbia Circuit entered on July 19, 1985.

This brief is filed in accordance with Rule 36.1 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

Howard University ("Howard"), which was created by an act of Congress in 1867, is the Federal Communications Commission ("FCC" or "Commission") licensee of Station WHMM-TV. WHMM-TV is a noncommercial educational station broadcasting on UHF Channel 32 in Washington, D.C. As the nation's only television station licensed to a predominantly black university, WHMM-TV provides a substantial amount of programming geared to the special needs and interests

of minority audiences. The station presents a unique set of viewpoints to its multi-ethnic and diverse audience -- viewpoints that otherwise may be given little exposure by broadcasters or programmers generally.[1]

Ever since it began operation in the Fall of 1980, WHMM-TV has vigorously pursued its rights under the FCC's "must carry" rules. Consistent with the rules, the station has sought carriage on each of the several cable systems located in the Washington, D.C. market.[2] WHMM-TV's

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[1] WHMM-TV airs some of the programming offered by the Public Broadcasting Service ("PBS"). However, about 80 percent of WHMM-TV's programming hours are different from those presented by the other Washington, D.C., PBS affiliate, WETA-TV.

[2] These systems provide cable television service to approximately 350,000 households. Arbitron, Audience Estimates in the Arbitron Market of Washington, D.C.; Meter and Diary Measurement at p. Int.-1 (May 1985).

experience with these systems demonstrates that, absent the must carry rules, the station's specialized programming and the substantial diversity it offers will be effectively denied to a significant number of those individuals which the station is licensed to serve.

Indeed, there is not a single cable television system carrying WHMM-TV which was not required to do so under the FCC's rules. Most of these systems commenced carriage of WHMM-TV only after the station had specifically invoked its must carry rights. Several other systems flatly refused to comply with WHMM-TV's carriage requests and to offer their subscribers WHMM-TV programming -- notwithstanding that they devoted channel space to a number of other

Washington, D.C. television stations with which WHMM-TV must compete for viewers. These systems required WHMM-TV to engage in costly and time-consuming litigation before the FCC in order to enforce its rights. One such cable operator, which has successfully avoided carriage of WHMM-TV for nearly five years since a carriage request was initially tendered, is now pursuing its resistance to WHMM-TV before a federal court of appeals.[3]

The refusal of a cable system to carry WHMM-TV is tantamount to blocking the station's access to that system's

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[3] St. Charles CATV, Inc. v. FCC, No. 85-1121 (D.C. Cir., filed Feb. 25, 1985). This case, which also involves constitutional challenges to the must carry rules, has been held in abeyance by the Court of Appeals pending final disposition of the petition for writ of certiorari here.

subscriber base. Because WHMM-TV is a UHF station, its signal is, in most cases, satisfactorily available over-the-air only to households which have installed an outdoor UHF antenna aimed in the direction of WHMM-TV's transmitter (located in Bethesda, Maryland). Cable subscribers are most unlikely to incur the additional expense of installing and maintaining a UHF antenna simply to receive WHMM-TV. In fact, as the FCC has recognized, "One of the standard selling points of CATV [cable] service is the subscriber's ability to dispense with expensive or unsightly outdoor antennas."[4]

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[4] First Report and Order in Docket Nos. 14895, et al., 38 F.C.C. 683, 702 n.25 (1965).

Even if a cable subscriber did maintain a UHF antenna, reception of broadcast signals by cable is technically superior to over-the-air reception of broadcast signals, particularly UHF signals. The result of a cable operator's failure to carry WHMM-TV is that the unique WHMM-TV signal, if available at all in the cable household, will be far inferior to that of the other Washington, D.C. stations which the cable operator has chosen to carry on his system.[5]

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[5] Because of the physical nature of the UHF and VHF bands, there is already a significant technical and economic disparity between UHF stations, such as WHMM-TV, and VHF stations. This disparity, which is a matter of significant Congressional concern, is known as the "UHF handicap." See generally S. Rep. No. 1043, 95th Cong., 2d Sess. 71-2 (1978). Those cable systems that refuse to carry WHMM-TV and at the same time carry WHMM-TV's VHF competitors simply exacerbate the problems associated with the UHF handicap.

In short, the FCC's must carry rules have been a critical component of WHMM-TV's efforts to reach the audience it is licensed to serve. Without these rules, carriage of WHMM-TV will likely be discontinued by those cable operators who consistently have resisted the station and its unique blend of programming; this, in turn, will effectively impede or block altogether WHMM-TV's access to many cable subscribers. Howard thus seeks reversal of the decision below and reinstatement of the FCC's must carry rules.

REASONS FOR GRANTING WRIT OF CERTIORARI

Some twenty years ago the Commission adopted rules requiring cable operators to set aside a portion of their "virtually

unlimited channel capacity" (App., p. 34a)[6] for the carriage of local television signals. The Commission "found that the CATV [cable] system which fails to carry the local station on its system has in practical effect cut off the station from access to CATV subscribers." Second Report and Order in Docket Nos. 14895, et al., 2 F.C.C.2d 725, 736 (1966). A principal objective of the must carry rules was, therefore, to ensure that cable operators not impede local broadcasters' access to the audiences which they are licensed to serve under the Communications Act of 1934, 47 U.S.C.

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[6] The abbreviation "App." refers to the Appendix to the "Joint Petition for Writ of Certiorari" filed September 23, 1985 by the National Association of Broadcasters, et al. The above-quoted language is from the decision of the Court below.

§ 151 et seq.[7]

The constitutionality of the "must carry" rules was upheld by the United States Court of Appeals for the Eighth Circuit in Black Hills Video Corp. v. FCC, 399 F.2d 65 (1968). And in United States v. Southwestern Cable Co., 392 U.S. 157 (1968), this Court affirmed the Commission's authority to adopt must carry rules because they promote the Communications Act objectives of program diversity and localism. See United States v. Midwest Video Corp.,

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[7] See First Report and Order in Docket Nos. 14895, et al., 38 F.C.C. 683, 702 (1965); Cable Television Report and Order, 36 F.C.C.2d 143, 173 (1972), on reconsideration, 36 F.C.C.2d 326 (1972), aff'd sub nom. American Civil Liberties Union v. FCC, 523 F.2d 1344 (9th Cir. 1975); J.C. Smith, Primer on the Regulatory Development of CATV, 18 How. L.J. 729, 736-47 (1975).

406 U.S. 649 (1972) (upholding Commission's authority to require origination of programming by cable operators). More recently, in Capital Cities Cable, Inc. v. Crisp, ____ U.S. ____, 104 S. Ct. 2694 (1984), this Court found that the must carry rules serve an "important and substantial federal interest" which justifies preemption of conflicting state regulation. 104 S. Ct. at 2708.

In the decision below, however, a panel of the United States Court of Appeals for the District of Columbia Circuit (Wright, J.) took a different view of the must carry rules. The lower Court concluded that the rules 1) do not in fact serve a "substantial or important governmental interest" (App., pp. 41a-52a), and 2) are

"grossly overinclusive" because they do not discriminate among those local stations which should and should not be carried according to various factors which the Court considers relevant (App., pp.52a -59a). The Court below vacated the must carry rules in their entirety, declaring that they constitute an impermissible interference with cable operators' first amendment right of "editorial discretion."

The decision below should be reviewed by the Supreme Court for the following reasons.

First, Supreme Court review is necessary to resolve the direct conflict between the Eighth Circuit in Black Hills Video Corp. v. FCC, supra, and the District

of Columbia Circuit below concerning the constitutionality of the must carry rules. Moreover, it is necessary to resolve the plain inconsistency between the conclusions reached below and in Capital Cities Cable, Inc. v. Crisp, supra. The rules cannot both serve a substantial governmental interest for purposes of preemption, as this Court concluded in Capital Cities, and at the same time not serve such an interest for purposes of the first amendment, as the lower Court concluded.

Second, Supreme Court review is essential to provide the lower courts with proper guidance concerning the applicablity of the first amendment to cable television. In Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 386 (1969), the Supreme Court

concluded: "[D]ifferences in the characteristics of new media justify differences in the first amendment standards applied to them." Because the Supreme Court has never considered the first amendment in the context of cable television (App., p. 19a), substantial confusion already exists as to how the appropriate constitutional standards should be applied, e.g., the conflict between the Eighth Circuit and the District of Columbia Circuit regarding the constitutionality of the must carry rules. See also App., pp. 19a-23a, where the Court below describes the conflicting approaches taken by the courts in first amendment cases involving cable.

It is particularly important that the Supreme Court provide the necessary guidance now because of the multiplicity of pending and threatened lawsuits involving first amendment challenges to a variety of cable regulation.[8] Absent such guidance,

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[8] See F. Lloyd, Cable Litigation: First Amendment Suits Seen Proliferating, in Cable T.V. and New Media, Vol. III, No. 7 at 4-5 (September 1985) (reviewing pending first amendment cable litigation and litigation which likely will be generated as a result of the decision below, including challenges to several portions of the recently enacted Cable Communications Policy Act of 1984, 47 U.S.C. § 501 et seq.)

In addition, a petition has already been filed with the Commission challenging, on the basis of the decision below, the constitutionality of the FCC's cable network nonduplication rules, which require cable operators to delete certain distant signal network programming which simultaneously duplicates that on a local signal. The constitutionality of these rules had previously been upheld in Black Hills Video Corp. v. FCC, supra, and in the following cases which relied upon Black Hills: Great Falls Community TV Cable Co. v. FCC, 416 F.2d 238 (9th Cir. 1969); Conley Electronics

[Footnote continued on following page]

there is likely to be substantial and potentially wasteful litigation.

Third, Supreme Court review is warranted because this case involves important first amendment issues which affect not only cable operators, but also commercial and noncommercial broadcasters throughout the nation.

The Court below focused its analysis solely upon the first amendment rights of cable operators. As noted above, however,

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[Footnote 8 continued from preceding page] Corp. v. FCC, 394 F.2d 620 (10th Cir.), cert. denied, 393 U.S. 858 (1968); and Titusville Cable TV, Inc. v. United States, 404 F.2d 1187 (3d Cir. 1968). Obviously, the effect of the decision below, unless reversed, will be to reopen in the federal courts many cable issues which had long since been resolved.

the very purpose of the must carry rules is to ensure that cable operators not abuse their natural monopolistic position[9] to impede local broadcasters' access to the audiences which they (the broadcasters) are licensed to serve.[10] This objective has its foundation in Communications Act

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[9] See Omega Satellite Products Co v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982) (Posner, J.).

[10] The Court below refused to accord weight to the FCC's expert judgment that must carry rules are necessary to achieve this objective, apparently because it thought the agency's judgment was not based upon empirical evidence. The FCC, however, specifically relied upon its extensive experience in implementing legislation designed to deal with the problems of UHF stations (App. p. 71a); no contrary evidence had ever been presented to the Commission. Furthermore, the Supreme Court has recognized that the "Commission's decisions must sometimes rest on judgment and prediction rather than pure factual determinations." FCC v. WNCN Listeners Guild, 450 U.S. 568, 594 (1981).

policy, but even more importantly in the first amendment itself. See Associated Press v. United States, 326 U.S. 1, 20 (1945) ("Freedom of the press from governmental interference under the first amendment does not sanction repression of that freedom by private interests");[11] Red Lion Broadcasting Co. v. FCC, supra, 395 U.S. at 387 (The right of free speech "does not embrace a right to snuff out the free speech of others").

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[11] In Associated Press v. United States, supra, a private news organization charged with violation of the antitrust laws for restricting dissemination of news to certain competitors, claimed that the government's enforcement of the antitrust laws (much like enforcement of the must carry rules) violated its first amendment rights. The Supreme Court rejected this claim, concluding that it was appropriate for the government to take necessary steps to preserve the free flow of information.

In adopting the must carry rules, the Commission sought to balance the first amendment rights of broadcasters to reach their local audiences without undue interference, and the rights of cable operators. With its myopic focus upon cable operators' rights alone, the Court below has upset this balance in a manner that relegates to insignificance broadcasters' first amendment concerns. Such an abrupt judicial reversal of a well-entrenched agency regulatory framework, with national and constitutional implications, deserves consideration by this Court.

Finally, Supreme Court review is necessary because the decision below will have a particularly pernicious effect upon

those public broadcasters, such as WHMM-TV, which provide minority-oriented programming. As WHMM-TV's actual experience demonstrates, it is this minority-oriented programming which cable operators will resist offering. Unless reversed by this Court, the decision below will thus frustrate rather than promote the objectives of the first amendment.

The purpose of the first amendment is, of course, to ensure "the widest possible dissemination of information from diverse and antagonistic sources." Associated Press v. United States, supra, 326 U.S. at 20. The must carry rules served that purpose. They ensured that cable subscribers had available all local television stations,

without regard to the specific content of the programming on those stations and thus without regard to the popularity or unpopularity of the ideas that might be expressed. Furthermore, compliance with the must carry rules did not in fact foreclose cable operators from offering, and cable subscribers from receiving, any particular programming. As the Court below recognized, cable operators have "virtually unlimited channel capacity" (App., p. 34a); thus, the technology is there to permit carriage of any programming service available to the cable operator, regardless of the number of local signals that must be carried.

This conclusion was plainly evident from the record below.[12]

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[12] There were two petitioners before the lower court -- Quincy Cable TV, Inc. ("Quincy") and Turner Broadcasting Systems, Inc. ("TBS").

Quincy Cable expanded its channel capacity so that it not only was able to carry all of the programming services that it wished along with the must-carry signals; it even had excess channels which were unused. (App., pp. 126a-127a.) And as the Court below noted, Quincy, with the expanded channel capacity, was "willing to carry" all of the local signals. (App., p. 28a n.28.)

With regard to TBS, the lower court, in anecdotal fashion, referred only to statements by Quincy that it would not carry TBS programming if required to comply with the must carry rules. (App., p. 24a n.24.) These statements are contradicted by the facts noted above. Moreover, TBS did not, in its submission to the FCC below requesting a rulemaking proceeding, provide a single example of any actual instance where a cable operator was unable to carry the TBS programming services because of compliance with the must carry rules. In any event, it should be emphasized that the TBS services (the "superstation" WTBS-TV and CNN) reach over 90 percent of the nation's cable households

[Footnote continued on following page]

If, however, the sweeping decision below is not reversed, cable operators will have unfettered discretion to control the programming which reaches their subscribers and thus to deny broadcasters access to the individuals whom they are licensed to serve. The likely result is that cable subscribers will be exposed to only the most commercially marketable programming, or to the programming of those who can afford to pay the cable operators' price for access. In either case, the

---

[Footnote 12 continued from preceding page] or approximately 34-35 million cable households (Cablevision, Sept. 9, 1985, at 40) -- more than 100 times the number of cable households potentially available to WHMM-TV. (See note 2, supra.) Clearly, the must carry rules have not, in any meaningful respect, hindered TBS' ability to get its message to the American public.

objectives of the first amendment will be frustrated, and the objectives of the Communications Act to disseminate broadcast signals to the widest possible audience, 47 U.S.C. § 151, will be undermined.

CONCLUSION

The "Joint Petition for Writ of Certiorari" should be granted.

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October 25, 1985

Supreme Court, U.S.
FILED
OCT 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-502

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,
Petitioners,
v.
QUINCY CABLE TV, INC., *et al.*,
Respondents.

BRIEF AMICUS CURIAE OF THE COUNCIL FOR UHF BROADCASTING IN SUPPORT OF GRANT OF CERTIORARI

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BRIEF AMICUS CURIAE OF THE COUNCIL FOR UHF BROADCASTING IN SUPPORT OF GRANT OF CERTIORARI

The Council for UHF Broadcasting (CUB) submits this brief *amicus curiae* in support of the Joint Petition for Certiorari pursuant to Supreme Court Rule 36.1 with consent of other parties. The decision of the court below has particular importance for television broadcasters using UHF channels (channels 14-69). CUB strongly urges the Court to grant certiorari so that important constitutional issues can be fully aired and serious damage to the public's service from UHF television stations denied access to cable-served homes can be avoided.

INTEREST OF THE AMICUS CURIAE

CUB is a coalition of commercial and public television associations and individual broadcasters dedicated to achieving the goal of comparability of UHF broadcasting to VHF broadcasting.[1] Growth of UHF broadcasting promotes several important national policies simultaneously: it provides an opportunity for new entry and additional competition in television; it guarantees a multiplicity of diverse voices and perspectives in free over-the-air broadcasting; it permits more programming of interest to smaller and more specialized audience groups; and it gives women and members of minority groups increased opportunities for participation and ownership in the television broadcast industry.

CUB has a vital interest in all matters affecting UHF broadcasting. As is more fully described below, the D.C. Circuit's decision voiding the must-carry regulations will have a disproportionate, adverse impact on UHF broadcasters because (1) it is likely that more UHF stations will be denied carriage rights than VHF stations as a result of the decision; and (2) UHF stations depend on cable carriage for acceptable reception quality to a greater extent than VHF broadcasters.

STATEMENT OF POSITION

CUB supports the Joint Petition for Writ of Certiorari because important constitutional issues were incorrectly

[1]CUB is a coalition including the Association of Independent Television Stations, the Association of Maximum Service Telecasters, the Corporation for Public Broadcasting, the National Association of Broadcasters, and the National Association of Public Television Stations, all of which, with the exception of the Corporation for Public Broadcasting and the National Association of Public Television Stations, were petitioners for certiorari. The National Association of Public Television Stations filed a brief supporting the grant of certiorari as a respondent pursuant to Supreme Court Rule 19.6.

decided by the court below. CUB hereby incorporates by reference petitioners' Questions Presented, Statement of the Case, and Reasons for Granting the Writ. In addition, CUB submits the following reasons also supporting grant of the writ.

ARGUMENT

I. The Decision Should Be Reviewed Because It Threatens To Stifle New And Existing Diversity Of Expression In The Country's Most Influential Medium.

The Court of Appeals assumed that one "objective," as well as clear "byproduct," of the must-carry rules was "to protect an established industry [over-the-air television] from the encroachment of an upstart young competitor [the cable industry]. . . ." Petitioners' Appendix at 10a (hereinafter "Pet. A."). But in the case of the must-carry rules, UHF television is the "upstart young competitor" whose interests the rules principally were designed to protect because it is in the UHF television band that minorities and women, public television stations, and other sources of new and diverse viewpoints are emerging. The Court of Appeals' decision in *Quincy* not only shuts the door on future "upstart young competitors" but pulls the rug out from those who have launched UHF stations in the past and who, with the must-carry rules vacated, cannot survive or can do so only by reducing their public service programming.

A few statistics vividly demonstrate that UHF has been the vehicle for greater diversity and additional competition in the over-the-air television industry and can be expected to continue in this role in the future. Since July 1, 1982, 148 new stations have gone on the air; 108, or 73%, have been UHF. Of the 24 educational stations that have begun operations since 1982, 75% have been UHF.[2] At the present time

[2]*See* FCC News Releases #5293 (July 22, 1982), and #6999 (September 12, 1985).

87% of the country's independent stations (those not affiliated with ABC, CBS or NBC) are UHF, and 62% of the country's educational stations are UHF.[3] Commission records do not facilitate a quantitative analysis of minority ownership of television stations. But since the landmark decision in *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), recognizing the desirability of minority preferences in licensing, successful applicants for new television stations have often had significant minority ownership and significant minority participation in management. These trends will continue in the future since, of the television allotments remaining vacant in December 1984, 54 were VHF and 462 were UHF.[4]

The must-carry principle was designed and for 20 years retained to assure the public's access to these stations, both for that nearly 45 percent of the public that receives its television programming via cable systems and for the remainder who continue to depend on free over-the-air broadcasting. The Court of Appeals admitted that such a policy may be sufficiently "important or substantial" to justify the rules under the First Amendment. Pet. A., p. 42a, quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). In addition, by preserving access to UHF and other local stations for the cabled public, the must-carry rules affirmatively serve First Amendment policies. This Court has held that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public. . . ." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945); see also *New York Times* v. *Sullivan*, 376 U.S.

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[3]*Television and Cable Factbook*, 1985 Edition, No. 53, "Handy Pocket Directory of Television Stations in Operation 1985."

[4]FCC Public Notice 3723 (April 19, 1985).

254, 270 (1964); *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Since cable systems are almost all *de facto* monopolies, and the must-carry rules prevent exercise of that monopoly power to limit access to an important conduit for free expression, this principle provides strong support for the must-carry rules.

Moreover, Congress itself has repeatedly recognized the importance of putting UHF on a comparable footing with VHF because it would serve the national policy objectives of providing for more diversity and competition in this country's most influential medium of ideas and viewpoints.[5]

II. The Court of Appeals Improperly Interpreted The Critical First Amendment Standards To Be Applied Here And Improperly Usurped The Agency's Functions Of Making Factual Findings And Tailoring Appropriate Solutions To Complex Regulatory Problems.

In this important First Amendment case the Supreme Court should exercise its oversight function to rein in the overreaching engaged in here. Otherwise, the Court of Appeals' decision could lead other lower courts seriously to misapply the broadly applicable First Amendment standards set forth by this Court in *O'Brien*; could invite other appellate courts to find facts in situations where this function would be better left to an expert agency; and could set a precedent for appellate courts to fashion regulatory relief that in the first instance should be the province of the administrative agency. While the petition for certiorari develops these points comprehensively, they are particularly

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[5] *See* All Channel Receiver Act, Pub. L. No. 87-529, 76 Stat. 150 (codified at 47 U.S.C. § 303(s) and § 330); S.Rep. No. 1526, 87th Cong., 2d Sess. 2-3 (1962); H.Rep. No. 1559, 87th Cong., 2d Sess. 3 (1962); *Report and Order*, 21 F.C.C.2d 245, 247 (1970).

telling when analyzed from the perspective of UHF television.

A. The Commission's Must-Carry Rules Are Supported By An Adequate Factual Basis and Are Not Unduly Broad.

The Court of Appeals held that (1) the Commission had not proved that non-carriage would hurt local broadcasting service and (2) the rules were overbroad for the purpose of protecting the public's legitimate interest in this local service.

If proof of injury to the public's local service is what the Court of Appeals wanted, it should have remanded the case to the Commission for this purpose, leaving the present rules in effect during the interim. But in fact the Commission had on numerous occasions reached the factual conclusion that the must-carry rules were necessary to assure the public's access particularly to newer and weaker UHF stations.[6] Moreover, it seems wholly defensible for the Commission to have concluded that if a struggling new UHF station — perhaps minority owned, perhaps a public broadcaster — cannot obtain access to the 40 percent, 50 percent, or 80 percent of the homes in its service area that are hooked up to cable, its prospects for survival and, accordingly, for rendering service to the public are substantially impaired or even eliminated. Indeed, this proposition seems so self-evident that the obligation to submit proof should have rested on those who sought to overturn the rules.

Also deficient is the Court of Appeals' treatment of the second prong of the *O'Brien* test — the question of the

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[6]The Commission has explicitly found that UHF stations would be at a significant competitive disadvantage vis-a-vis VHF stations without the benefit of must-carry. *See, e.g.*, Inquiry Into the Economic Relationship Between Broadcasting and Cable Television, 71 F.C.C.2d 632, 713 (1979).

"congruence" between the Commission's means, the must-carry rules, and the end, preserving the public's access to local service. The Court of Appeals suggested that must-carry rules might properly protect stations that carry substantial amounts of local programming (Pet. A. at 54a), and elsewhere that they might properly protect local stations whose economic well-being is most vulnerable. (Pet. A. at 56a). Since the amount of local programming a station broadcasts often reflects its economic strength, a rule assuring carriage of only those stations that currently carry substantial local programming would fail to protect many weaker stations which over time might nevertheless grow in strength and thereby improve their public service programming in quality and quantity. Moreover, a must-carry rule which distinguishes between stations on the basis of program content might raise serious constitutional problems of its own. In short, there may be sound reasons for the Commission not to develop rules that pick and choose which local stations cable systems must carry, but instead to have determined that if cable systems carry any broadcast station under the Commission's jurisdiction,[7] they must carry all local stations.

The problem of cable systems with limited channel capacity (though a problem within the cable systems' ability to remedy) and the problem of must-carry local signals that largely duplicate each other may call for fine tuning of the Commission's rules. But if waivers are not adequate for this purpose, these issues should have been remanded for the Commission to resolve in an appropriate rulemaking.

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[7]If a particular cable operator chooses to carry no broadcast stations at all (a rare occurrence), the Commission has or should have no jurisdiction to impose mandatory carriage rights.

B. The Court of Appeals Made Factual Findings Far Beyond Its Proper Role.

The Court of Appeals made critical and erroneous factual assumptions on questions that should have been left to the agency. For example:

(1) The Court of Appeals assumed that the rules benefitted entrenched broadcasters against struggling cable entrepreneurs, while in fact they put struggling UHF entrepreneurs who promise in the long run to add much program diversity on a more competitive footing with their usually better established VHF counterparts.

(2) The Court of Appeals failed to recognize or give proper weight to the fact that cable systems are in fact monopolies that have bottleneck power over which television stations are received in cable homes, and that this power would often be used to preclude or impair the access of weaker UHF stations into large proportions of their service areas that are cabled.

(3) The Court of Appeals' discussion (Pet. A. at pp. 48a-49a, n. 48) of how the cable public does have access to local television signals not carried by cable systems contradicts the expert agency's factual findings. UHF broadcasters know that the difference between cable carriage of their signals and reliance on A/B switches can mean the difference between survival and the termination of their local service.

(4) Although not involving a factual finding of the same kind, the FCC would also far better understand the relationship between the must-carry rules and the federal copyright scheme for cable retransmissions of broadcast programming which the Court of Appeals

wrongly dismissed in a brief footnote. Pet. A., pp. 41a-42a, n. 42.

C. The Court's Order Vacating the Rules Constituted an Improper Overreaching of Appellate Powers.

The various flaws of the Court of Appeals' approach to this case led it to overreach in vacating the rules rather than sending them back for the Commission to review and revise as appropriate in light of First Amendment concerns. As matters now stand, the Commission has both found it "inconceivable" that it can fashion must-carry rules that would meet the standards of the Court of Appeals' decision[8] and declared that the decision creates a serious "imbalance" because of the cable compulsory license provisions of the Copyright Act.[9] On certiorari, this Court can ensure that the carriage rights upon which UHF broadcasters depend — and the established national communications policies which the must-carry rules promote — are not erased permanently on the basis of misapplication of the law and the improper, overreaching factfinding of the lower court.

CONCLUSION

The petition for writ of certiorari should be granted.

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October 25, 1985

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[8]Pet. A. at 138a.

[9]*Id.*

No. 85-502 (12)

Supreme Court, U.S.
FILED
OCT 23 1985
JOSEPH F. SPANIOL, JR.
CLERK

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI

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BRIEF OF THE CITY OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF JOINT PETITION FOR WRIT OF CERTIORARI

The City of New York ("the City") files this brief, as *amicus curiae*, in support of the petitioners' prayer that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered herein on July 19, 1985 (768 F.2d 1434).

This brief is filed in accordance with Rule 36.4 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

The City has been involved in franchising and regulating cable television systems since 1964. The City presently has in place ten franchises for cable television systems, covering all areas within the five Boroughs of the City, which have the

potential of serving over two million households. The City is a franchising authority within the meaning of Section 602(9) of the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.* ("the Cable Act"), and actively participated in the development of that legislation.[1]

The City is concerned that, if permitted to stand, the Court of Appeals opinion will upset the delicate balance between federal and local regulation of cable television systems that was achieved in the Cable Act; will leave the law concerning the scope of enforceable service requirements in cable franchises in a state of confusion and disarray; and will impede or prevent franchising authorities from accomplishing fundamental regulatory objectives with regard to cable television. For the reasons stated *infra*, the City respectfully submits that the decision of the Court of Appeals below was incorrect as a matter of law and, if permitted to stand, will substantially impair the ability of local governments (1) to condition cable television franchises upon the requirement that cable systems carry local broadcast television signals on a nondiscriminatory basis; and (2) to enforce other requirements regarding cable services in the public interest.

SUMMARY OF ARGUMENT

For some twenty years prior to the Court of Appeals decision below, the Federal Communications Commission ("FCC") required, by virtue of its "must-carry" rules (47 C.F.R. §§ 76.57-61 (1984)), that cable system operators carry the signals of local television broadcast stations. Irrespective of considerations of competitive parity among broadcasters, the must-carry rules had the purpose and effect of ensuring that cable subscribers had ready access to local television stations licensed to serve them.

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1 The City is also a licensee of a public television station (WNYC).

Throughout this twenty-year period, the City, as well as thousands of other local governments throughout the United States, granted cable franchises with the expectation that—in addition to whatever other programming services such systems might carry—they would, at a minimum, facilitate subscribers' reception of all local broadcast stations, on a nondiscriminatory basis. Cable system operators regularly accepted franchises with this understanding. When, in 1984, Congress enacted the Cable Act to establish a national policy clarifying the existing system of local, state and federal regulation of cable television, the continued existence of the FCC's must-carry rules constituted an important centerpiece around which the regulatory scheme was crafted.

In its decision below, however, the Court of Appeals invalidated the FCC's must-carry rules, on the ground that the rules impinged upon the editorial discretion of cable system operators in violation of the First Amendment—primarily because, in the judgment of the Court of Appeals, the need for the rules was based on the agency's "speculation," "unsubstantiated intuition," and "collective instinct," rather than on an adequate empirical investigation. The City submits that the decision of the Court of Appeals merits plenary review by this Court for the following reasons:

First, since it is based firmly on constitutional grounds, the decision below places a cloud over the power of local cable franchising authorities, such as the City, to require or enforce provisions similar to the FCC's must-carry rules in cable franchises, or to agree upon enforceable franchise provisions with respect to other kinds of programming services in the public interest. The uncertainty created by the decision is particularly ironic and destructive, coming as it does less than a year after enactment of comprehensive federal cable legislation that was intended finally to resolve the scope of permissible regulation of cable after years of disagreement and inconclusive litigation.

Second, the decision involves an important issue of constitutional law that should be resolved by this Court. In deciding that, for First Amendment purposes, cable television is indistinguishable from traditional print media, the court below applied an improper and unworkable First Amendment analysis. Moreover, the decision is in direct conflict with the decision of at least one other Circuit, and, the City submits, is inconsistent with the results reached in prior decisions of this Court and numerous decisions of other lower federal courts.

Third, the Court below should not have purported to resolve definitively the ultimate substantive constitutional issues on the basis of the record before it. By ignoring the less drastic alternatives for dealing with the deficiencies it perceived in the factual predicate for the FCC's must-carry rules, the Court of Appeals has unnecessarily cast the law of cable regulation into disarray.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW WILL PRECIPITATE RECURRING DISPUTES CONCERNING THE POWER OF LOCAL FRANCHISING AUTHORITIES TO REGULATE CABLE TELEVISION SYSTEMS PURSUANT TO THE CABLE COMMUNICATIONS POLICY ACT OF 1984

In 1984, many years after the need for comprehensive federal cable legislation was first observed by this Court,[2] and after extensive discussions and compromises by representatives of the cable industry and local governments, Congress enacted the Cable Act. A principal purpose of this legislation was to establish, for the first time, "a national policy that clarifies the current system of local, state and Federal regulation of cable television." Report of the Committee on Energy and Commerce, H.R. Rep. No. 934, 98th Cong., 2d Sess. 19 (1984)

2 *See United States* v. *Midwest Video Corp.*, 406 U.S. 649, 676 (1972) (Burger, C.J., concurring).

("Committee Report"). In doing so, Congress intended to establish a policy that would continue to rely "on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process." *Id.* Specifically, Congress intended that the Cable Act would "preserve the critical role of municipal governments in the franchise process." *Id.*

The decision below—which fails even to acknowledge the existence of the Cable Act—is likely to undercut the statutory role for local franchising authorities established by Congress, and will have significant adverse effects on the efforts of franchising authorities to regulate the services provided on cable systems in the public interest.

Conventional wisdom holds that, "[b]ecause of . . . start-up costs and the nature of the cable television market . . . , cable systems have operated largely free from competition." *Berkshire Cablevision of Rhode Island, Inc.* v. *Burke*, 571 F. Supp. 976, 986 (D.R.I. 1983), *appeal dismissed as moot*, No. 83-1800 (1st Cir. Sept. 24, 1985). While the cause of this situation may be disputed, the key operative fact is not: without question, the vast majority of cable television systems in the United States—indeed, all but a handful—face no competition for subscribers from other cable television systems.[3] As a result, aspects of the services rendered by these local monopolies have traditionally been subject to regulation by local governments. In exchange for granting permission to use public streets to construct a cable system, many franchising authorities, including the City, have long sought to condition the granting of such permission upon the cable operator's promise to carry certain minimum programming services.

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3 Nor do alternative technologies provide effective competition for cable systems; the "industry consensus" appears to be that such technologies "are no match for cable systems being introduced in the same urban markets." Arthur D. Little, Inc., *Prosperity for Cable TV: Outlook 1985-1990—Report to National Cable Television Association* 19 (1985).

Congress expressly recognized and approved this practice in the Cable Act. For example, Section 624(b)(2)(B) of the Cable Act authorizes the enforcement of franchise requirements "for broad categories of video programming or other services."[4] Section 611 of the Cable Act permits the establishment of requirements in a cable franchise with respect to channel capacity for public, educational or governmental use. Section 612 requires, independent of the requirements in any local franchise, that cable systems with at least thirty-six channels designate that a specified percentage of such channels (depending upon the size of the system) be available for commercial leasing by unaffiliated persons. In Section 624(f)(2), Congress also sought to preserve existing FCC regulations regarding the content of cable services (including the must-carry rules which the Court of Appeals has now invalidated).

All of these provisions, taken together, reflect an attempt by Congress to balance the cable operator's interest in selecting its own programming against both the federal and local interest in ensuring that cable systems, which are *de facto* monopolies, meet certain minimum service requirements and make available some reasonable portion of their channel capacity for use by First Amendment speakers other than the franchised cable operator alone. Congress did not want or intend monopoly cable operators to function as the sole arbiters of the programming that will or will not be available in cable markets.

The decision below, however, will obstruct operation of the regulatory scheme contemplated by Congress in several ways.

First, since the decision is firmly premised upon constitutional grounds, it is likely to encourage challenges to the constitutionality of requirements in franchise agreements, such as those in effect in the City, which require cable operators, as a contractual matter, to carry the very same signals mandated

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4 In the case of franchises which precede the effective date of the Cable Act, such as the City's franchises, Section 624(c) authorizes the enforcement of *any* service requirements in a franchise.

by the FCC rules which the Court of Appeals below has now struck down as unconstitutional.

Modern cable television systems are capable of accomplishing many communications objectives. But their original function was, and a fundamental purpose remains, to facilitate the reception of local broadcast television signals. In many parts of the City, for example, and particularly in the Borough of Manhattan—where cable franchises were first granted by the City in 1970—broadcast television reception is often of poor and frequently unviewable quality because of the "ghosting" effect resulting from tall buildings.

Indeed, the City first granted cable franchises for Manhattan primarily to facilitate the clear reception of local broadcast television signals. Nevertheless, the decision below might well be invoked by a cable operator as grounds for ignoring its contractual commitment and ceasing to carry local broadcast television signals or (more likely) deciding to favor the signals of some local stations over others. For example, one franchised cable operator in Manhattan has already dropped the signal of a local public television station, presumably in reliance upon the decision below.[5]

The decision below also places local governments in a quandary as to how responsibly to discharge their roles under the Cable Act. For example, does the First Amendment demand that franchising authorities develop empirical evidence for particular franchise requirements, such as those mandating nondiscriminatory carriage of local broadcast television stations, or does that limitation apply only to the FCC?

Second, the decision below upsets the balance that Congress struck between federal and local regulation of cable services. In new franchises and renewals of existing franchises, Section 624(b)(2)(B) of the Cable Act limits the enforceability of

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5 *See* Multichannel News, Oct. 7, 1985, at 1, col. 3.

franchise requirements to merely "broad categories" of video programming; local franchising authorities may not seek or enforce requirements in such franchises for specific programming services. In so limiting the authority of *local* governments, Congress at the same time expressly grandfathered the FCC's must-carry rules in Section 624(f) of the Cable Act.[6] In the absence of the FCC's must-carry rules, however, it now may be disputed whether a reasonable definition of local broadcast signals constitutes one of the "broad categories" of video programming that, consistent with the statute, a franchising authority may enforce in a cable franchise.

The decision below is therefore likely to impede the efforts of local franchising authorities to require, through provisions in their franchises, the carriage of local broadcast television signals. Congress anticipated that this fundamental goal of national cable policy would be achieved, instead, by retaining the FCC's existing rules.

Third, if the Court of Appeals' determination that the must-carry rules unconstitutionally infringe upon the editorial discretion of the cable operators is permitted to stand, it is likely to encourage cable operators to challenge, on similar grounds, the constitutionality of both public, educational and governmental access channel requirements in cable franchises that are authorized by Section 611 of the Cable Act and the commercial leased channel requirements imposed directly by Section 612.

In enacting the Cable Act, Congress carefully considered the First Amendment implications and adopted an approach that Congress believed would secure "the First Amendment right of

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6 Section 624(f) grandfathers FCC regulations as in effect on September 21, 1983, and as subsequently amended in a manner consistent with the provisions of the Cable Act. The legislation history clearly reflects that the rules which Congress sought to preserve in the Cable Act expressly included those which the Court of Appeals has now struck down: "Regulations which relate to the content of cable service and which remain in effect include the FCC's must-carry requirements (47 CFR 76.51 *et seq.*)." Committee Report at 70.

the viewers and listeners to a diversity of information sources, in the manner least restrictive on the cable operators' First Amendment interests." Committee Report at 36. Relying expressly upon the unanimous decision of this Court in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), which upheld FCC rules that prevented a local daily newspaper from owning broadcast properties in the community in which it published, Congress reasoned that, *a fortiori*, the provisions of the Cable Act should pass constitutional muster:

> "In effect, [the FCC's] rules completely bar newspapers and cable systems from speaking through the broadcast medium in the communities they serve. If these are permissible, then surely a less restrictive regulation that does not absolutely ban speech through the cable medium, but requires only some limited sharing of bottleneck facilities on a content-neutral basis, is also valid." Committee Report at 33.

Hence, Congress drafted into the Cable Act provisions which it intended to strike a balance among the First Amendment interests of subscribers, cable operators and cable programmers in a manner which involves a minimum of content regulation and recognizes the special status of cable operators as users of a scarce public resource (*i.e.*, the public rights-of-way). The decision below, however, if permitted to stand, will cast a dark shadow of uncertainty over this delicate legislative compromise.[7]

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7 Experience prior to enactment of the Cable Act suggests that the threat of disruptive litigation to test the validity of various aspects of cable regulation, in light of the decision below, is far from illusory. For example, in enacting comprehensive federal cable legislation, Congress expressly observed that, prior thereto, "[m]unicipal authority to franchise and regulate cable television systems [had] been under an increasing number of challenges on three fronts: in the courts, at the Federal Communications Commission, and at the state public utility commissions." Commitee Report at 19.

II. THE LOWER COURT'S RULING INVOLVES AN IMPORTANT ISSUE OF CONSTITUTIONAL LAW THAT SHOULD BE RESOLVED BY THIS COURT

The Court of Appeals below premised its decision upon its erroneous conclusion that, for First Amendment purposes, cable is indistinguishable from traditional print media. In this respect, while acknowledging this Court's admonition that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them,"[8] the Court of Appeals found that the "scarcity rationale" has no place in evaluating government regulation of cable television.

Thus, the Court of Appeals rejected arguments that either the fact that cable operators require use of public rights-of-way or the natural monopoly characteristics of cable should influence the nature of the proper First Amendment analysis. By implication, the court below likewise rejected the recent judgment of Congress, in enacting the Cable Act, that appropriate regulation of cable "can enhance speech and promote the goals of the First Amendment." Committee Report at 31. Instead, preferring to ignore the reality of cable markets as they exist in fact and a long line of cases which recognize the justifications for different treatment,[9] the Court of Appeals chose to proceed on the theoretical assumption that, for First Amendment purposes, "there is no meaningful distinction between cable television and newspapers.' " 768 F.2d at 1450.

But to conclude, as did the court below, that cable systems are not necessarily *identical* to broadcasters does not mean that

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8 *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 386 (1969).

9 *See, e.g., Berkshire Cablevision of Rhode Island, Inc.* v. *Burke*, 571 F. Supp. 976 (D.R.I. 1983), *appeal dismissed as moot*, No. 83-1800 (1st Cir. Sept. 24, 1985); *Community Communications Co.* v. *City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982); *Omega Satellite Products Co.* v. *City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Hopkinsville Cable TV, Inc.* v. *Pennyroyal Cablevision, Inc.*, 562 F. Supp. 543 (W.D. Ky. 1982).

they are identical to newspapers. In fact, cable systems possess a multifaceted character—combining elements of common carriers, utilities and broadcasters, as well as publishers—which demands its own careful First Amendment analysis.

The decision of the court below to subject cable television to precisely the same First Amendment test as the print media, the City suggests, is unrealistic. The decision represents an erroneous new approach which will hinder, rather than further, the development of appropriate First Amendment standards for cable to achieve the ultimate First Amendment goal of encouraging cable systems to contribute to "the widest possible dissemination of information from diverse and antagonistic sources." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). Reasonable requirements that franchised cable systems provide minimum categories of programming services do not violate the First Amendment; on the contrary, such requirements advance the public's First Amendment interest in receiving a diversity of programming.

By invalidating the must-carry rules, on its novel theory, the Court of Appeals has also declared invalid rules which this Court held, just over a year ago, to serve an "important and substantial federal interest" sufficient to justify preemption of any conflicting state regulation. *Capital Cities Cable, Inc.* v. *Crisp*, ____ U.S. ____, 104 S. Ct. 2694 (1984). The decision also directly contradicts the holding of the United States Court of Appeals for the Eighth Circuit in *Black Hills Video Corp.* v. *FCC*, 399 F.2d 65, 69 (8th Cir. 1968) that the must-carry rules satisfy the applicable First Amendment standards.

III. THE COURT BELOW SHOULD NOT HAVE RESOLVED THE ULTIMATE SUBSTANTIVE CONSTITUTIONAL ISSUES ON THE RECORD BEFORE IT

The court below purported not to determine whether "any" version of the mandatory carriage rules would contravene the First Amendment, and suggested that the rules may have been permissible at the time they were drafted, but became unconstitutional only at some unspecified point in the interim when the FCC's "collective instinct" was no longer adequate to suffice for what the Court of Appeals believed to be the agency's obligation to "get the facts" to substantiate its rules in a more objective, empirically verifiable manner.

The Court of Appeals decision may articulate instructive principles of administrative law. *Cf. Coal Exporters Association of the United States, Inc.* v. *United States*, 745 F.2d 76 (D.C. Cir. 1984). But the issue of whether the FCC drew supportable inferences from, and took sustainable actions based upon, the evidence before it need not and should not have been elevated to the level of a First Amendment question. The Court of Appeals failed to heed the fundamental rule that constitutional questions should not be anticipated prematurely, and should be avoided if there exists an alternative ground upon which a case might be decided. *See, e.g., Ashwander* v. *TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). A major premise of the Court of Appeals' far-ranging, constitutional analysis—that the FCC's rules were not adequately supported by the factual record—provided such an alternative and more limited basis for decision which the court below chose not to address.

Moreover, the record below afforded an extremely unsatisfactory basis for promulgating broad First Amendment principles of general applicability. Instead of directing the FCC to revisit the need for the existing must-carry rules, the court below in effect conducted its own rulemaking proceeding, and resolved various disputed issues in the process. Thus, for

example, the Court of Appeals made definitive and, the City believes, erroneous findings with respect to the ease with which broadcast television stations may bypass cable systems altogether in order to deliver their signals where cable systems exist, and with respect to whether cable systems tend to be natural monopolies.

Appellate courts are not well equipped to adjudicate complex, technical questions of fact in the first instance. Nevertheless, the court below apparently felt constrained to resolve disputed factual issues—and hence to prejudice their potential adjudication in other forums. Moreover, the Court of Appeals seems to have been oblivious that Congress, in enacting comprehensive federal cable legislation in 1984, so recently resolved many of these factual issues in a different manner.

The approach taken by the Court of Appeals creates a significant risk of serious judicial error and raises important issues concerning the scope of judicial review that warrant examination by this Court. If the court below was dissatisfied with the factual basis that appeared in the record for the FCC's must-carry rules, it should have required the agency to conduct further rulemaking proceedings with respect thereto. It should not have reached out to resolve complex factual issues in a manner adverse to the validity of rules which constituted the foundation for cable regulation for two decades. In so doing, the Court of Appeals has rendered a decision which merits this Court's plenary review before it spawns further judicial error and years of unnecessary litigation in regard to the important questions involved.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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October 23, 1985

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